

Legal Theory Workshop
UCLA School of Law

Jed Lewinsohn

Assistant Professor of Philosophy
University of Pittsburgh

“QUID PRO QUO: A THEORY OF EXCHANGE”

Thursday, February 27, 2019, 5:00-6:50 pm
Bruce H. Spector Conference Room, Law 1314

Light refreshments will be available at **4:45 pm** and you are welcome to come a little early to mingle.

*Draft, February 10, 2020. For UCLA Workshop. Please
Don't Cite Or Quote Without Permission.*

Dear UCLA Workshop Participants:

Please find attached material – some of it polished, some of it rougher – on quid pro quo exchange and (to a lesser extent) the doctrine of consideration. I am especially interested in discussing the conceptions of exchange and debt, as I am working on a book refining my theory and applying it to a range of practical issues, including political corruption, commodification, and exchange in friendship. (The material on consideration is excerpted from a just-published article, while the core middle section incorporates substantial unpublished material.)

To confront the elephant in the room at the outset: I am still waiting to hear back from Mitch McConnell about what he thinks of my theory!

Really looking forward to the discussion.

Thanks,

Jed

Quid Pro Quo: A Theory of Exchange

Jed Lewinsohn

introduction

Under the common law, contractual liability attaches to commitments made to others. Unlike the law of property, which lays down not only the legal consequences of the various forms of ownership but also the conditions of ownership itself, the common law of contract piggybacks on an independent social practice that it does not purport to create or define—namely, the practice of committing to courses of conduct by making promises or entering into agreements.¹ Since interpersonal commitments are pervasive features of social life—they are made in all contexts in which humans interact cooperatively and in every medium in which they communicate—the most basic task confronting this body of law is to demarcate the sphere of legally enforceable commitments and thereby to determine the domain of the contractual. In the common-law tradition, the broadest and most visible line separating enforceable and unenforceable commitments is drawn by the doctrine of consideration, a fact that explains the doctrine’s enduring position in the law-school curriculum. Like the doctrines of first possession in property, assault in tort, and nondelegation in administrative law, consideration’s prominence is due not to the frequency with which it arises in litigation but to the fundamental position it purports to occupy in the structure of a major area of law.

Notwithstanding these pretensions, it cannot be said that the doctrine of consideration, in its modern form, has performed this basic demarcating function in a consistent or principled manner. At least since the late nineteenth century, and quite likely since its origins in the sixteenth, the doctrine of consideration in contract law has been understood to rest on a distinction between exchange transactions (i.e., bargains) and gratuitous transactions, and to limit the legal enforcement of promises and agreements, unless under seal, to those belonging to the former category.² This general conception of consideration—what is known as the bargain theory of

-
1. To draw out the contrast a little further, we may note that a deeds-registration system of land management, for example, does not constitute an independent social practice but one that is established and maintained by law. This contrasts with the case of contracts, where a practice of interpersonal commitments is presupposed and endowed with legal significance. Thus, the Second Restatement of Contracts defines “contract” as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty,” RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981), and defines “promise” as “a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding *that a commitment has been made*,” *id.* § 2 (emphasis added).
 2. For historical background concerning the doctrine of consideration (and the common law of contracts more generally) I rely primarily on the work of J.H. Baker, D.J. Ibbetson, and A.W.B. Simpson. *See generally* JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 338-85 (5th ed. 2019) [hereinafter BAKER, ENGLISH LEGAL HISTORY]; D.J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 24-38, 71-94, 126-51, 202-61 (1999) [hereinafter IBBETSON, A HISTORICAL INTRODUCTION]; A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 199-488 (1975); J.H. Baker, *Origins of the “Doctrine” of Consideration, 1535-1585*, in ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE 336 (Morris S. Arnold et al. eds., 1981) [hereinafter Baker, *Origins of Consideration*]; David J. Ibbetson, *Consideration and the Theory of Contract in Sixteenth Century Common Law*, in TOWARDS A GENERAL LAW OF CONTRACT 67 (John Barton ed., 1990) [hereinafter Ibbetson, *Consideration and the Theory of Contract*].

consideration—has been reduced in modern times to a more specific rule, which can be traced to Christopher Columbus Langdell’s textbook definition of consideration as “the thing given or done by the promisee *in exchange for* the promise.”³ This modern consideration rule, requiring as a condition of contractual validity that the promisor receive something in exchange for her promise, has been handed down to at least four generations of students together with a number of well-known problems that continue to hamper the doctrine, both in theory and in practice.⁴ These problems include certain undesirable or counterintuitive applications of the rule (in areas such as conditional gift promises, contract modifications, option contracts, guarantee agreements, and social and domestic agreements) as well as a failure to identify a plausible rationale that can be used to make sense of it. As a result of these problems, many have called for the wholesale eradication of the bargain requirement.⁵ One aim of this paper is to open up space between the general conception and the specific rule, and to show that many of the familiar difficulties with consideration result from the specific rule rather than from the general conception. My purpose is not so much to defend the bargain requirement as it is to render it intelligible; only then will we be able to ask whether consideration is a doctrine worth keeping, and what, if anything, might take its place.

By claiming that the modern rule badly implements the bargain requirement, I mean more than that the rule emphasizes the wrong aspects of a bargain, or takes too narrow a view of the range of objects whose exchange would satisfy the requirement. Rather, my claim is that the modern rule implicitly relies on a seductive but altogether mistaken conception of what a bargain or exchange is. While this conception was implicit in Langdell’s definition, it was rendered explicit the following year by Oliver Wendell Holmes, Jr., and later codified (and slightly modified) in the Second Restatement of Contracts.⁶ Thus, in its boldest formulation, my claim is that two giants of the common law, Langdell and Holmes, mangled a central doctrine of contract law by severing the link between the doctrine of consideration and the proper conception of a bargain. This error, in my view, spawned confusion that has impeded contract law to this day. Given a better understanding of the notion of bargain or exchange and a doctrine of consideration refashioned so as to make contact with it, many of the problems associated with the modern rule can be resolved.⁷

Quite apart from consideration, there is ample independent reason to want an adequate account of quid pro quo exchange, and it is another central aim of this paper to use the doctrine of consideration to develop and anchor such an account. Quid pro quo exchange is one of the basic modes of giving and receiving benefits, and it is both broader and narrower than is sometimes supposed. On the one hand, the category includes more than narrowly economic activity (such as the sale and barter of the marketplace or wage labor arrangements in the workplace), and embraces

-
3. C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES 1011 (Boston, Little, Brown, & Co. 2d ed. 1879) (emphasis added).
 4. This is not to say that the consideration rule has not changed during this time. Most notably, this period includes, in the United States, the rise and fall of the benefit-detriment requirement conceived of as independent of the exchange requirement. See E. ALLAN FARNSWORTH, CONTRACTS § 2.2, at 47 (4th ed. 2004).
 5. See, e.g., ANDREW BURROWS, UNDERSTANDING THE LAW OF OBLIGATIONS 197 (1998).
 6. See *infra* notes 13-35 and accompanying text.
 7. Despite the specificity of these allegations, I hasten to clarify that my central concerns are conceptual, not historical. If Langdell and Holmes had precursors, my charges would apply to them as well. However, regardless of what was original to them, there is no denying Langdell and Holmes’s massive influence in the modern development of this body of law.

transactions as varied as plea bargains, prisoner exchanges, and bribes. On the other hand, while *quid pro quo* is a species of reciprocity (that is, of “returning kindness with kindness”), it should not be conflated with the more general category. There are many ways in which two individuals can confer benefits upon one another without carrying out a *quid pro quo*. For example, when, without any discussion of reward, an individual in distress receives help from a sympathetic passerby, the recipient may later be moved to send a gift (for instance, chocolate or wine) to the helper in a gesture of gratitude. Although each person has given something to the other, in the form of goods or services, no *quid pro quo* has occurred, and it would be incorrect (and not merely cynical) to say that the help was given in exchange for the gift, and vice versa.⁸

The theoretical challenge, then, is to identify the species of reciprocity that constitutes an exchange. This is a task well worth pursuing, as it is difficult to overstate the practical and theoretical significance of the exchange form. In the law alone, *quid pro quo* figures prominently in a wide range of legal contexts—civil as well as criminal, public as well as private—and lies at the heart of a variety of raging legal controversies concerning official corruption, insider trading, and other matters. Although *quid pro quo* is a transsubstantive concept in the law, we find the law’s most developed and influential account of it in the context of the doctrine of consideration. Indeed, one finds in the legal literature surrounding this doctrine two fundamentally different conceptions of *quid pro quo*. Developing these accounts, and subjecting them to critical scrutiny, will allow us to produce an adequate theory that captures the essential elements of the exchange form.

i. langdell’s folly

The doctrine of consideration conditions a promisor’s liability on some suitably related, ostensibly desired course of conduct on the part of the promisee. In so doing, it enshrines a form of mutuality or reciprocity at the heart of the common law of contracts. But there are many forms of mutuality and reciprocity, and not all can lay claim to an association with the doctrine of consideration. Although a sequence of good turns between neighbors or the alternating, synchronized movements of rowers attempting to reach a distant shore may be paradigmatic examples of reciprocity and mutuality, neither one falls within the ambit of the doctrine. At least since the late nineteenth century, and quite probably from the doctrine’s origins in the sixteenth century, the requirement of consideration has been understood to rule out informal, gratuitous promises or agreements as candidates for legal enforcement.⁹ On this understanding, the form of reciprocity singled out by the doctrine of consideration is the doing or giving of something in exchange for something else, also known as *quid pro quo* exchange.

8. Thus, if the helper had been a public official acting in an official capacity, accepting the gift in such a situation might amount to an unlawful gratuity, but—if the help was genuinely rendered gratuitously and not on the understanding that the gift would follow—it would not constitute bribery.

9. The restriction to *informal* promises reflects the traditional rule that “[a] gratuitous promise becomes legally binding if it is made under seal or if it is made in exchange for ‘nominal’ consideration, such as a peppercorn or £1.” STEPHEN SMITH, *CONTRACT THEORY* 217 (2004). Of course, when such formalities are not recognized in a given jurisdiction—as they are not in the majority of American jurisdictions, *see* FARNSWORTH, *supra* note 4, § 2.11, at 72, § 2.16-17, at 86-88—the practical significance of this limitation becomes nil. In modern times, promissory estoppel has also been used to enforce certain promises absent consideration. However, the nature and content of the estoppel principle, as well as its relation to the consideration doctrine, have been greatly debated and lie beyond the scope of the present inquiry. For one conception of the estoppel doctrine that is fully compatible with the theory of consideration elaborated in this paper, see Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake,”* 52 U. CHI. L. REV. 903 (1985).

To say that the doctrine of consideration imposes some exchange (alternatively, bargain) requirement on enforceable promises marks no departure from prevailing understandings. There is perhaps no single definition in all of contract law—perhaps all of private law—more familiar to law students than the Second Restatement’s definition of consideration, which is couched plainly in terms of exchange.¹⁰ And while there has been considerable debate among historians concerning whether, at its advent, the doctrine of consideration had anything to do with reciprocity at all, both sides of that debate take for granted that, if the early doctrine was related to any form of reciprocity, it was to quid pro quo exchange.¹¹ Nevertheless, if it is a commonplace that the line drawn by the doctrine of consideration is drawn around exchange, it is, I believe, one that has not been sufficiently borne in mind by those pursuing either positive or normative analysis. As I will show, many of the well-known difficulties that have become associated with the doctrine are due to a failure to reckon with the notion of *exchange* that lies at the core of the rule.¹²

The modern understanding of the consideration requirement may largely be traced to the definition of consideration put forth by Christopher Columbus Langdell in 1879 in the summary appended to the second edition of his famous casebook: “The consideration of a promise is a thing given or done by the promisee in exchange for the promise.”¹³ According to this definition, which remains the textbook formulation to this day, the consideration that supports a promise (consideration that is comprised of the promisee’s performance, when the contract is unilateral,

10. RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981) (“(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”).

11. Although his view is not widely accepted—for some prominent dissents, see generally BAKER, ENGLISH LEGAL HISTORY, *supra* note 2; IBBETSON, A HISTORICAL INTRODUCTION, *supra* note 2; Baker, *Origins of Consideration*, *supra* note 2; and Ibbetson, *Consideration and the Theory of Contract*, *supra* note 2—Simpson has argued at length that the requirement of consideration, prior to the late nineteenth century, had little to do with reciprocity at all, but was rather a means of ensuring that the law would enforce only those promises made for “good reasons”—to ensure, in other words, that the *considerations* which motivate enforceable promises are in some sense worthy. In so arguing, Simpson expressly sets himself in opposition to the “bargain theory” that he attributes to Holmes’s followers, who are accused of “link[ing] their theories about the modern law to their account of the history of the subject.” SIMPSON, *supra* note 2, at 417 n.1.

12. This is not to suggest that no one has recognized the importance, for the study of the law of consideration, of providing such an account of exchange. In his seminal paper *Consideration and Form*, Lon Fuller observes that

[i]n the executory bilateral contract . . . the element of exchange stands largely alone as a basis of liability and its definition becomes crucial. Various definitions are possible. . . . The problem of choosing among these varying conceptions may seem remote and unimportant, yet it underlies some of the most familiar problems of contract law.

Fuller, *supra* note **Error! Bookmark not defined.**, at 817 (footnote omitted). Unfortunately, while recognizing the problem, Fuller makes no serious effort to provide an analysis of the pivotal concept. The “[v]arious definitions” he canvasses are marked by their vagueness and imprecision, and Fuller unfortunately makes no attempt to improve upon them:

We may define exchange vaguely as a transaction from which each participant derives a benefit, or, more restrictively, as a transaction in which the motives of the parties are primarily economic rather than sentimental. Following Adam Smith, we may say that it is a transaction which, directly or indirectly, conduces to the division of labor. Or we may take Demogue’s notion that the most important characteristic of exchange is that it is a situation in which the interests of the transacting parties are opposed, so that the social utility of the contract is guaranteed in some degree by the fact that it emerges as a compromise of those conflicting interests.

Id.

13. LANGDELL, *supra* note 3, at 1011.

and the promisee's counterpromise, when bilateral) stands, necessarily and in all cases, in an exchange relation to the *promise* itself.¹⁴ Langdell's definition quickly took root in the legal establishment, and by 1899, James Barr Ames, Langdell's successor as dean of Harvard Law School, could correctly assert in the pages of the *Harvard Law Review* that "[E]veryone will concede that the consideration for every promise must be some act [including a counterpromise] or forbearance given in exchange for the promise."¹⁵

And yet, despite this reception, there is surprisingly little precedent for Langdell's definition of consideration, either in case law or secondary sources on either side of the Atlantic.¹⁶ More

14. I am helping myself to the traditional distinction between unilateral and bilateral contracts, even though the Second Restatement has abandoned these terms on account of "doubt as to the utility of the distinction." RESTATEMENT (SECOND) OF CONTRACTS § 1, reporter's note to cmt. f. As Farnsworth observes, "[E]ven the Restatement Second recognizes that an offeror may make an offer that 'invites an offeree to accept by rendering a performance and does not invite a promissory acceptance.'" FARNSWORTH, *supra* note 4, § 3.4, at 206 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 45). I will follow Farnsworth and use the term "unilateral contracts" to refer to those that are formed by such nonpromissory acceptances, and "bilateral contracts" to refer to those formed by promissory acceptances.

15. Ames, *Bilateral Contracts*, *supra* note **Error! Bookmark not defined.**, at 31.

16. Williston, although an early champion of Langdell's definition, acknowledged its uncertain relation to the history of the doctrine: "No doubt, during its development consideration meant something more or different than something given by the promisee in exchange for the promise, but that is the end to which it gradually tended, and which it now may be held to have reached." Samuel Williston, *Successive Promises of the Same Performance*, 8 HARV. L. REV. 27, 33 (1894).

It is crucial to avoid being misled by those earlier definitions that identify consideration with the *causa* or *cause* of the civil law. For example, Powell, who frankly acknowledged in his note to the reader that "many of the observations and general remarks here submitted for [the reader's] consideration, have been taken . . . from the civil law writers," 1 JOHN JOSEPH POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS, at xii (London, J. Johnston & T. Whieldon 1790), defines consideration as "the *material* cause of a contract or agreement; or that, in expectation of which, each party is induced to give his assent to what is stipulated reciprocally between both parties," *id.* at 330. While the posited motivational relation is a relation between the consideration and the promise, there is no reason to interpret this relation as a relation of quid pro quo exchange. As Pollock and other bargain theorists of consideration have pointed out, the civilian *causa* (or *cause*) embraces many kinds of gratuitous agreements. FREDERICK POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY 118-19 (London, Stevens & Sons 1st ed. 1876) (describing how, in Roman law, "[i]nformal agreements (pacta) did not give any right of action without the presence of something more than the mere fact of the agreement. This something more was called *causa*. Practically the term covers a somewhat wider ground than our 'consideration executed'"); *id.* at 148 (explaining, in comparing consideration with the modern French *causa*, that "nothing would at first sight seem more natural to an English lawyer than simply to translate *cause* by *consideration*. But let him turn to a French commentary on the Code, and he finds no distinct and comprehensive definition of *cause* as a legal term of art, but a scholastic discussion of *efficient*, *final*, and *impulsive* causes. Going on to see what is in fact included in the *cause* of the French law, we find it wider than our Consideration in one way and narrower in another. On the one hand the existence of a natural [i.e. moral] obligation, or even of a real or supposed duty in point of honour only, may be quite enough. Nay, the deliberate intention of conferring a gratuitous benefit, where such intention exists, is a sufficient foundation for a binding unilateral promise . . .").

The clearest historical antecedent to Langdell of which I am aware is in the opinion of *Eagan v. Call*, 34 Pa. 236, 237 (1859) ("Want of consideration can only be, where the promisee parts with nothing in exchange for the promise. The consideration *fails*, when the promisor does not get that which the promisee agreed to give, as a motive for the promise.") Three points are in order. First, there is no evidence, as far as I know, that this definition had any impact on the development of the law or on Langdell. (It is perhaps relevant that, somewhat notoriously, the only cases included in Langdell's casebook come from England, Massachusetts, and New York.) Second, assuming the second quoted sentence from *Eagan* is a reformulation of the preceding one, it corroborates my argument, offered below, that Langdell's definition relies on a motivational conception of exchange. *See infra* text accompanying note 23. Third, *Eagan* concerned a sales case where payment was tendered using a bill. 34 Pa. at 236. As I discuss below, all accounts of exchange could agree that *in a case like that* it is the promise (merged with the bill) that is given in exchange for the performance. *See infra* note 76 and accompanying text. Thus,

importantly, and quite apart from the historical question of whether it constituted an innovation, Langdell's definition is as a purely conceptual matter in tension with the traditional common-law conception of bargain or exchange as reciprocal remuneration (alternatively, recompense), a conception that figures repeatedly in discussions of the doctrine of consideration from the sixteenth century until Langdell's definition took root.¹⁷ This traditional conception of bargain or exchange is well articulated by Edmund Plowden, in what Frederick Pollock characterized as "the first full discussion of Consideration by that name,"¹⁸ a case report of *Sharington v. Strotton*.¹⁹ According to

although these sentences use general terms, it is possible that the definition should be implicitly restricted to the facts of the case (i.e., that it should be read, "want of consideration [in cases like this] can only be . . .").

Finally, one must not be misled by the well-worn phrase, used to describe unexecuted bilateral contracts, that "mutual promises are consideration for each other," the proper import of which was well captured by Henry Ballantine many years ago:

When the [contractual] action of *assumpsit* was first introduced in the sixteenth century, the only consideration recognized was an executed consideration, value actually given or detriment incurred. To extend the action to [wholly unexecuted] bilateral contracts without appearance of change, it was said that "mutual promises are consideration for each other," and this became the language of pleading and of the courts. But the courts have never stopped to analyze what they meant by "promise." They simply meant that executory consideration was sufficient. It is therefore not necessary to take this loose and uncritical language of the judges and pleaders literally. . . . Like many legal mottoes and catch phrases, the easy and time-honored formula that promise is consideration for promise is but a legal "bromide," which is ordinarily used as a substitute for thought, to disguise a lack of analysis under vague and specious words.

Henry Winthrop Ballantine, *Mutuality and Consideration*, 28 HARV. L. REV. 121, 125-26 (1914).

Admittedly, there is one pocket of early English law—namely, the doctrine of independency as it related to the purely executory contract—that might conceivably be taken as precedent for Langdell's position, insofar as the cases explicating that doctrine appear to put to work the idea that mutual promises are given *for* one another. Here, too, though, there is considerable room for doubt. After all, the doctrine regarding mutual promises may well have resulted from a decision to extend to contract the relevant principles governing mutual covenants rather than from a commitment to Langdell's later conception of consideration. As S.J. Stoljar explains,

[S]tarting with the principle that mutual covenants were independent unless express words of condition made one covenanted performance dependent upon, or prior to, the other, the courts had no other method of construction The law [of contracts] . . . took as its model not the sale by mutual grants where concurrency was the natural solution, but the mutual covenants for service where concurrent performance was impossible; the law followed the latter analogy because, executory agreements being by covenant, "covenant" thus appeared to map out the area of relevant precedent.

S.J. Stoljar, *Dependent and Independent Promises: A Study of the History of Contract*, 2 SYDNEY L. REV. 217, 220-21 (1957). In any case, if the doctrine of independence indeed reflected an early commitment to Langdell's conception of consideration, the law's subsequent movement away from independency and toward concurrency can perhaps be conceived of as a move away from that conception.

17. By way of contrast, three years before the publication of Langdell's definition, in the first edition of arguably the first systemic treatise of the common law of contract, Frederick Pollock approvingly quoted the definition of the Exchequer Chamber: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." POLLOCK, *supra* note 16, at 147 (quoting *Currie v. Misa* (1875) 10 LR Exch. 153 at 162 (Lush J)). While this has been correctly understood to express a bargain conception of consideration, the definition neither says nor implies that the valuable consideration stands in an exchange relation with the promise it supports (as opposed to the promised performance). As I discuss below, Pollock does not adopt (a variant of) Langdell's definition until the 1881 edition of his treatise. See *infra* notes **Error! Bookmark not defined.** **Error! Bookmark not defined.** and accompanying text. Similarly, the definition of consideration given in the 1879 edition of Anson's important treatise does not say or imply that the bargained-for benefit is given in exchange for the promise: "Consideration [is] some gain to the party making the promise, arising from the act or forbearance, given or promised, of the promisee." WILLIAM R. ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT* 29 (Oxford, Clarendon Press 1879).
18. POLLOCK, *supra* note 16, at 151.
19. *Sharington v. Strotton* (1565) 75 Eng. Rep. 454; 1 Plowden 298.

Plowden, “a bargain . . . is, when a recompense is given by both the parties, as if a man bargains his land for money, here the land is a recompense to the one for the money, and the money is recompense to the other for the land, and this is properly a bargain and sale.”²⁰ According to this definition—advanced not only by Plowden, but also by other preeminent authorities such as Christopher St. German and William Blackstone—reciprocal transfers of goods or services constitute a bargain or exchange just in case each transfer is viewed as payment for the other.²¹

This definition of exchange is incompatible with Langdell’s definition of consideration. More precisely, if the promisee’s performance (in the unilateral contract) or counterpromise (in the bilateral contract) stands always in an exchange relation to the promisor’s promise,²² then, if ordinary usage is any guide, the exchange relation cannot be identified with the relation of reciprocal payment or remuneration. This can be seen most easily by considering ordinary sales contracts (an agreement to transfer goods for money), paradigm cases of contracts with good consideration. Let us start with the unilateral case: a seller of goods makes an offer to Jones to deliver certain goods if Jones pays the seller fifty dollars. Jones pays the money and the goods are delivered as promised. Now, we may ask, does Jones’s transfer of funds constitute remuneration for the transfer of the goods or for the promise to transfer them? No one whose understanding has not been distorted by confused doctrines of consideration would have any difficulty answering that, in the usual case, the payment is for the goods and not the promise to give them. Since the payment, in this example, *does*, for Langdell, constitute consideration for the promise, it follows, on pain of inconsistency, that Langdell’s definition relies on an alternative sense of exchange. The same result is even more clearly reached in the case of ordinary bilateral sales agreements. As long as the agreement remains unexecuted on both sides—that is, before either the goods or the money

20. *Id.* at 461; 1 Plowden at 303. Commenting on this definition, Simpson notes that “[t]hrough contemporaries did not call an agreement to build a house for money (for example) a bargain, but a covenant, the same analysis will fit such a transaction.” SIMPSON, *supra* note 2, at 416-17. While Simpson recognizes that bargain or exchange agreements satisfy the sixteenth-century consideration requirement, he nevertheless insists that the requirement can be satisfied in other ways as well, and so concludes that consideration should not be characterized as a doctrine that requires bargain as a condition of enforcement. *See id.* at 417-24.

21. 2 WILLIAM BLACKSTONE, COMMENTARIES *446 (“Sale or exchange is a transmutation of property from one man to another, in consideration of some recompense in value: for there is no sale without a recompense; there must be quid pro quo.”); *cf.* CHRISTOPHER ST. GERMAN, DOCTOR AND STUDENT 228 (T.F.T. Plucknett & J.L. Barton eds., Selden Society 1974) (1530) (“[S]uche bargaynes and sales be called contractes/ & be made by assent of the partyes vppon agrement betwene theym of goodes or landes for money or for other recompence . . .”). In addition to identifying bargain or exchange with reciprocal recompense (i.e., payment), St. German and Blackstone, in the same chapters, also treat consideration as equivalent with recompense. *See* 2 BLACKSTONE, *supra*, at *441 (“[H]e did it without any consideration or recompence . . .”); *id.* at *444-45; ST. GERMAN, *supra*, at 228 (“[A] nude contracte is where a man maketh a bargayne or sale of his goodes or landes wythout any recompence appoynted for yt. As yf I saye to a nother I sell the all my lande or all my goodes & nothyng is assygned that the other shall gyue or paye for yt/ that ys a nude contracte/ and as I take yt: it ys voyde in the lawe and conscyence . . .”).

22. According to the modern rule, it is not enough that a promise was made in the hope or expectation of getting something in exchange for it; rather, a promise satisfies the modern consideration requirement just in case the promisor actually does receive something in exchange for making it. Since all agree that the formation of any valid contract is coterminous with the acceptance of the offer, the consideration the promisor receives must be given when the offer is accepted. It follows that in a bilateral contract (where the offer is accepted by a counterpromise) the modern consideration requirement is satisfied just in case each promise is given in exchange for the other, while in a unilateral contract (where the offer is accepted by a nonpromissory act) it is satisfied just in case the act which constitutes the acceptance of the offer stands in an exchange relation to the promise.

has changed hands—no one who aims to be speaking proper English would say that a payment (much less two of them) has already been made merely on account of the handshake.²³

Although Langdell himself did not articulate the alternative conception of exchange upon which he implicitly relied, strides were made the following year, 1880, in Oliver Wendell Holmes’s seminal lectures on the common law. Holmes put forward a definition of consideration that purported to precisely specify the relation between promise and consideration in terms of motivational concepts:

[I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.²⁴

It is important to grasp the precise meaning of Holmes’s definition. *X* is a “motive or inducement” for *Y* if *X* is done with the aim, though not necessarily the sole or exclusive one, of producing *Y*; *X* and *Y* are reciprocal inducements if each is done with the aim of producing the other.²⁵ In the terms of contract law’s theory of offer and acceptance, an acceptance serves to bind the offeror and thereby serves to transform the offer into a binding promise. Returning to the earlier example of the unilateral sale, in which the seller’s offer is accepted by means of the buyer’s payment, the seller’s promise stands in a relation of reciprocal inducement to the payment if the offer is made in order to induce the payment and the payment is made with the aim of binding the seller. Likewise, in the bilateral case, where the offer is accepted by the counterpromise, the offer

23. I am of course assuming that the parties themselves, and outside observers, would be *correct* in denying that the acts of assent in typical sales contracts (among other valid contracts) stand in payment relations to each other. However, I hasten to clarify that none of the main claims of this Article rely on it. Accordingly, if one is unwilling to be guided by ordinary usage (however firm), one may say that the modern rule requires an alternative conception of *payment* (different than the one implicit in the reported intuitions) rather than an alternative conception of *exchange* (different than the payment conception). And if one were to take this course, one may then view Part II of my paper as an elaboration and evaluation of competing conceptions of payment (instead of just competing conceptions of exchange), and Part III as the elaboration of a non-Langdellian consideration rule fashioned out of my preferred conception of payment. Additionally, I fully acknowledge that some writers who have adopted the modern rule have attempted to preserve the connection between consideration and payment by substituting “price” for “exchange” in the Langdellian formula. Most prominently, in the first of the editions of Pollock’s influential *Principles of Contract* to follow the publication of Langdell’s definition (i.e., Pollock’s third edition, published in 1881), Pollock adopts Langdell’s definition but substitutes “price” for “exchange”: “An act or forbearance of the one party, present or promised, i[s] the price for which the promise of the other is bought, and the promise thus given for value is enforceable.” FREDERICK POLLOCK, *PRINCIPLES OF CONTRACT* 179 (London, Stevens & Sons 3d ed. 1881). And Samuel Williston adopted the same terminology in his influential treatise. *See, e.g.*, 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 574, at 1097-98 (1st ed. 1920). However, calling a tail a leg does not make it one, and it is instructive that the most distinguished students of the subject have demonstrated discomfort with Pollock’s terminology. Patrick Atiyah, for example, occasionally paraphrases Pollock’s definition, but, silently and without comment, consistently places the term “price” within scare quotes so as to signal the incorrect usage. *See, e.g.*, P.S. ATIYAH, *Consideration: A Restatement*, in *ESSAYS ON CONTRACT* 179, 207 (1990) (“[C]onsideration, in short, is the ‘price’ of the promise.”). *See also* Atiyah’s earlier use of the same quotation mark in an uncited formulation in the same paper. *Id.* at 181.

24. HOLMES, *supra* note **Error! Bookmark not defined.**, at 265. The lectures were delivered in the fall of 1880, and the contract lectures were drafted in the summer of 1880. *See* Patrick J. Kelley, *A Critical Analysis of Holmes’s Theory of Contract*, 75 NOTRE DAME L. REV. 1681, 1682 (2000).

25. Instead of “with the aim of,” I could have written “as a means of” or “in order to.” These are equivalent formulations.

and acceptance stand in a relation of reciprocal inducement if each is made with the aim of binding the other party to the deal.

Holmes's definition of consideration does not require that the parties actually possess the motives that would satisfy a so-called subjective reciprocal-inducement condition. One would instead expect, given his well-known views about mental-state requirements in the law, a so-called objective construal of the condition: that is, one would expect him to say that the promisor must merely *manifest* the aim of inducing the consideration, while the promisee must merely *manifest* the reciprocal aim of binding the promisor. But he does not say this; rather, by invoking what Grant Gilmore has rightly called a "mysterious phrase"²⁶—that is, "reciprocal *conventional* inducement"—Holmes replaces an objective motive requirement with a "conventional" one, which can be satisfied by the "terms of the agreement" even when objective manifestations are absent. It is clear from the context that Holmes avoided offering the objective construal only to accommodate the traditional allowance for nominal consideration.²⁷ Assuming, as Holmes did, that the allowance was to follow from the definition of consideration, some such accommodation was clearly necessary: when someone "sells" their nephew the family farm for a dollar, it is abundantly manifest that they do not hand over the keys (or commit to doing so) as a means of obtaining the dollar (or the commitment to give it). Accordingly, for one who is prepared either to disallow nominal consideration, or to recognize it as an exception to, rather than a fulfillment of, the requirement of consideration, there would be no reason to go beyond the objective construal of the requirement.

Although Holmes offers this motivational account of the relation between promise and consideration, he stops just shy of explicitly identifying the relation of "reciprocal conventional inducement" with the relation of exchange. However, in the previous lecture, he explicitly identified "our peculiar and most important doctrine . . . [of] consideration" with "the rule . . . that there must be *quid pro quo*."²⁸ It is, perhaps, possible that Holmes intended to put forward "reciprocal conventional inducement" only as a sufficient condition of exchange, and not as a complete analysis. However, this possibility is remote enough that we may safely say that Holmes's theory of consideration is an application of a general theory of *quid pro quo* exchange. This interpretation gains further support from, first, its hand-in-glove fit with Langdell's definition of consideration—it supplies the definition of "exchange" that appears to substantiate Langdell's view of the matter—and, second, the air of plausibility that reciprocal inducement enjoys as a theory of *quid pro quo* exchange. After all, when parties sell or trade goods or services, it is at least usually the case that each gives (partly) in order to receive, or at least appears to do so. And, in any case, even if Holmes stopped just short of explicitly identifying the relation of "reciprocal conventional inducement" with the exchange relation, the drafters of the Second Restatement had no such qualms. Putting two and two together, they both adopted Langdell's definition of

26. GRANT GILMORE, *THE DEATH OF CONTRACT* 22 (Ronald K.L. Collins ed., 1995).

27. In the sentence immediately preceding the quoted definition, he says, "A consideration may be given and accepted, in fact, solely for the purpose of making a promise binding." HOLMES, *supra* note **Error! Bookmark not defined.**, at 265.

28. *Id.* at 234; see also *id.* at 243 ("Wherever consideration was mentioned, it was as *quid pro quo*, as what the contractor was to have for his contract.").

consideration, cast in terms of exchange, and repackaged Holmes's motivational definition of consideration as a definition of exchange.²⁹ This was made fully explicit in the comments:

Consideration requires that a performance or return promise be “bargained for” in exchange for a promise; this means that the promisor must manifest an intention to induce the performance or return promise and to be induced by it, and that the promisee must manifest an intention to induce the making of the promise and to be induced by it.³⁰

In a well-known discussion, Gilmore called Holmes's “bargain theory” of consideration “revolutionary doctrine” and maintained that in propounding it Holmes “was not in the least interested in stating or restating the common law as it was.”³¹ Yet Gilmore did not capture the nature of the revolution he set out to describe. If he was referring merely to a new technical definition of a consideration requirement cast in the terms of reciprocal inducement, then his claims were overstated, as this alone hardly amounts to “a revolutionary change in legal thought.”³² If, alternatively, he was suggesting that, in Holmes's hands, the consideration doctrine came to embody, for the first time, a requirement of bargain, he faces the powerful arguments to the contrary offered by some of our most distinguished historians of the common law, such as J.H. Baker, D.J. Ibbetson and others. What truly did amount to a revolutionary change in legal thought, however, was the silent substitution of one conception of bargain or exchange for another, a revolution so silent that it has evaded detection by historians of even Baker's and Ibbetson's stature, who have, I believe, read Langdell's conception back into the older sources.³³ And this

29. They employed the objective rather than conventional variant of reciprocal inducement, reflecting their reversal on nominal consideration.

30. RESTATEMENT (SECOND) OF CONTRACTS § 81 cmt. a (AM. LAW INST. 1981). For an especially full-throated statement of the Holmesian theory, see RESTATEMENT (SECOND) OF CONTRACTS § 75 cmt. b (AM. LAW INST., Preliminary Draft No. 2, 1961) (“‘Bargained for and given in exchange.’ In the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of the consideration. Here, as in the matter of mutual assent, the law is concerned with the external manifestation rather than the undisclosed mental state: it is enough that one party manifests an intention to induce the other's response and to be induced by it and that the other responds in accordance with the inducement. . . . But it is not enough that the promise induces the conduct of the promisee or that the conduct of the promisee induces the making of the promise; both elements must be present, or there is no bargain.”). The story of what happened between Holmes's seminal lectures and the Second Restatement's adoption of his definition is an interesting one involving the Holmesian theory of exchange “working itself pure.” The simplified version is that Williston, the chief Reporter of the First Restatement, wanted to have it both ways, holding both that consideration is always given in exchange for the promise and that the exchange relation is a relation of reciprocal payment. That he was serious about the latter proposition is clear not only from his repeated statements that consideration is the “price” or “payment” of the promise; more importantly, he had a good enough grip on the concept of payment to use it to explain, as we shall see in Part III, the unenforceability of informal social and domestic arrangements that plainly satisfy reciprocal inducement. *See infra* notes **Error! Bookmark not defined.** and accompanying text. The story of these intervening years also involves the rise and fall of the “benefit-detriment” requirement, conceived of as an independent requirement that serves to supplement the exchange requirement. Although I will not argue the point here, this too should be seen as the natural culmination of Holmesian theory of exchange. In this light it is significant, and unsurprising, that the benefit-detriment rule met its demise in a 1918 Corbin paper, *see* Arthur L. Corbin, *Does a Pre-Existing Duty Defeat Consideration?—Recent Noteworthy Decisions*, 27 YALE L.J. 362 (1918), and was explicitly negated in the Second Restatement, *see* RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. a (AM. LAW INST. 1981).

31. GILMORE, *supra* note 26, at 22.

32. *Id.* at 122 n.36 (quoting 2 MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS: 1870-1882, at 245 (1963)).

33. In saying this, I am not relying on the more general claim that Langdell's definition marked an innovation. Rather, my present claim is the narrower one that some of our best historians have read Langdell's definition of

“new day dawned” not “with Holmes,” but with Langdell, and culminated in the work of Arthur Corbin and the (Second) Reporters.³⁴ All revolutions have their casualties. In this case, as I will show in Part III, the casualty was nothing less than the intelligibility of the doctrine of consideration. Armed with an account of exchange that eschews Holmes’s motivational focus and instead analyzes the notion of payment central to the older definition of bargain, we will be in a position to take up, also in Part III, the constructive task of formulating a new doctrine of consideration. The revised doctrine will allow us to place the consideration requirement in its best light by ascribing to it a rationale that is both intelligible and historically compelling, and to avoid the unfortunate doctrinal results associated with the prevailing theory. Before reaching these doctrinal issues, however, we must consider and evaluate the alternative theories of exchange on their own terms. In particular, if the history uncovered in this Part (a history of conceptual appropriation) teaches us anything, it is that it is not enough to define bargain or *quid pro quo* in terms of reciprocal payment if the latter term is as in need of definition as the former.³⁵

consideration (a definition that characterizes consideration as that which is given in exchange for the *promise*) into particular earlier sources that neither said nor implied it. Thus, Baker offers the following gloss on a fifteenth-century report: “One of the clerks of the King’s Bench actually described the payment for the promise as *quid pro quo*.” Baker, *Origins of Consideration*, *supra* note 2, at 355. Baker cites to Simpson’s transcription, which reads as follows: “BROWN (the second clerk): If a man prepays any sum of money that a house be built for him etcetera and he does not do it, now he will have an action of trespass on his case because the defendant has *quid pro quo* and so the plaintiff is damaged. And this was privately denied to him, etc.” SIMPSON, *supra* note 2, at 626. As far as I can see, nothing in this quotation says or implies that the prepayment was payment for the promise and not the house. Moreover, Baker’s general descriptions of sixteenth-century developments bear the same marks of Langdell’s influence: “Consideration, like cause, was a conveniently ambiguous word to choose for the purpose. On the one hand, *the consideration for a promise could mean that which was given in return for it . . .*” BAKER, ENGLISH LEGAL HISTORY, *supra* note 2, at 361 (emphasis added). As far as I can discern, none of the sources he goes on to discuss in the passage justifies the choice to use this variant of the Langdellian formula in a general characterization of sixteenth-century law. Similarly, in summarizing his defense of the bargain theory as a historical theory of consideration, Ibbetson writes that “[i]n developed law [of the sixteenth century and beyond] the idea behind . . . consideration was . . . the principle of mutuality: A’s promise had been given in exchange for the performance of some act by B,” adopting Langdell’s formula even when no single source quoted in that article compelled him to do so. Ibbetson, *Consideration and the Theory of Contract*, *supra* note 2, at 69. Likewise, in his important book on the history of the law of obligations, Ibbetson remarks, in the context of a discussion of Lord Gilbert’s early eighteenth-century contracts treatise, that “[Gilbert] gave ‘consideration’ its orthodox Common-law meaning of something given in exchange for the promise.” IBBETSON, A HISTORICAL INTRODUCTION, *supra* note 2, at 237. Although Ibbetson once again invokes the Langdellian formula, Gilbert’s treatise does not quite have the meaning he ascribes to it. The definition referred to states that “consideration is defined by the lawyers [to be] a cause or occasion meritorious that requires a *mutual recompence* in fact or in law.” 1 Lord Chief Baron Gilbert, A Collection of Manuscript Law Tracts 77 (early 18th century) (British Library Hargrave MS No. 265 fol. 40r) (scanned copy on file with author). It is not just that this definition neither says nor implies that consideration stands in an exchange relation to the promise it supports; more significantly, Gilbert’s definition is cast in the traditional terms of reciprocal remuneration that, as a purely conceptual matter, are at odds with Langdell’s formulation. I am grateful to Michael Lobban and David Ibbetson for their help in researching this matter. Gilbert’s formulation also appears in JOHN DODERIDGE, THE ENGLISH LAWYER 131 (photo. reprinted 2005) (London, Assigns of I. More 1631). Finally, even Simpson, who bases many of his arguments against the bargain theory on the claim that certain enforceable promises can’t be construed as promises to remunerate, occasionally slips into the Langdellian mode: “By recognizing the rule that a promise was enforceable if given in return for [money] payment or some other recompense the common law came to enforce bargains—two-sided agreements in which performance by one party is paid for by the other party, and vice versa. In such bargains things of value are exchanged—land for money, chattels for money, services for money, and so forth.” SIMPSON, *supra* note 2, at 416 (emphasis added). Simpson does not seem to recognize that the (italicized) Langdellian gloss is inconsistent with the sentences that immediately follow, which go on to characterize the payment relation as holding between the performances, rather than the promises to perform.

34. GILMORE, *supra* note 26, at 21.

35. Although I have just observed the incompatibility between the notion of reciprocal payment and the sense of “exchange” that figures in Langdell’s definition, one may reasonably wonder whether there are any other

ii. *quid pro quo* exchange: a philosophical account

It is, in some ways, no surprise that the law of consideration has been tainted by a failure to reckon with its leading concept, *quid pro quo* exchange. For despite its immense practical and theoretical significance, *quid pro quo* exchange is perhaps the least understood of the most basic modes of human interaction. To be sure, it can hardly be doubted that exchange involves the mutual provision of goods or services among discrete individuals or groups. Yet the bilateral performance of ostensibly desired services no more establishes that an exchange has occurred (rather than a pair of good turns, say) than does the utterance of a sentence in the indicative mood establish that an assertion has been made (rather than a guess or a joke, say). And while one who wishes to understand what endows an utterance with assertoric force has recourse to a vast philosophical literature, the determinants of exchange, over and above the bilateral provision of goods or services, remain shrouded in darkness. As with the speech act, we may expect individual motives, shared understandings, and normative practices to figure centrally in an account of exchange. Yet the contents of these motives, understandings, and practices, as well as their configuration in an explanation of the transactional form, remain utterly obscure.³⁶

If the exchange form has received less than its due from philosophers, it is not because it is lacking in either practical or theoretical significance. In the practical realm, legal and social norms lean heavily on the concept of exchange. It is not just the doctrine of consideration; in the United States, at the time of this writing, legal rules governing situations as varied as the receipt of benefits by public officials,³⁷ the regulation of campaign contributions,³⁸ the recourse of victims of theft or

candidates, besides reciprocal inducement, that might fit the Langdellian bill. The challenge is to identify some other sense of “exchange” that holds both between promise and counterpromise *and* between the ensuing performances in the typical bilateral sales contract, as no one would wish to deny that the money and the goods typically stand in an exchange relation. (Williston makes this explicit. *See infra* note 50.) The reciprocal-inducement theory of exchange, as I will develop it in Part II, meets this criterion, which is precisely what makes it such a good companion for Langdell’s definition. I may further note that an otherwise tempting “I will if you will” account of exchange—specifically, one that identifies two acts as standing in an exchange relation just in case they together fulfill an “I will if you will” agreement—does not seem to meet the stated criterion, since it would not seem to apply to the relation between the commitments themselves in the typical case. Nevertheless, since some might be attracted to such an “I will if you will” theory of exchange irrespective of its compatibility with Langdell’s definition, I will note here, and again in Part II (where relevant), that several of the counterexamples that I will put forward against reciprocal inducement are also effective against the “I will if you will” theory of exchange. Finally, it is noteworthy that an “I will if you will” theory of exchange, unlike both the reciprocal-inducement and reciprocal-payment theories, cannot explain the conceptual connection between exchange and instrumental motivation.

36. One of the only discussions of exchange—certainly the most interesting and significant—in contemporary Anglophone philosophy is A.J. Julius’s *The Possibility of Exchange*, 12 POL. PHIL. & ECON. 361 (2013). However, the closest Julius comes to a general characterization of the exchange form is his claim that exchange is “a pair of services each performed because its author takes it to bear some important relation to the other.” *Id.* at 365. Moreover, in my view, the final sections of that paper ought to be recharacterized: Julius’s hopeful appeal to joint agency is better seen, not as a form of morally legitimate exchange, but rather as a proposal for how we can get some of the same benefits of exchange through other (less problematic, by his lights) modes of collaboration. *See id.* at 369-72.
37. *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016) (“Section 201 prohibits *quid pro quo* corruption—the exchange of a thing of value for an ‘official act.’”).
38. *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (“When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.” (citing *McConnell v. FEC*, 540 U.S. 93, 296-98 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II))).

fraud to the assets of the perpetrators ahead of competing creditors,³⁹ the deduction of taxable income,⁴⁰ and even the trading of financial securities on the basis of inside information⁴¹ all prominently invoke the notion of exchange, such that legal outcomes frequently turn on whether or not something was done or given in exchange for something else. Additionally, most legal regimes in the world, including both common- and civil-law regimes, define “gift” partly in terms of *quid pro quo*, lending conceptual priority to the latter. (This is typically achieved by a requirement of gratuitousness, which is in turn usually defined as a lack of *quid pro quo* or consideration.)⁴² Similarly, because widely held social norms make the proper deployment of the exchange form to a considerable degree dependent on social context, the choice of whether to deploy the form is often used as an opportunity to clarify the context. For example, in the context of friendship (and also philanthropy) we often take pains to resist characterizing even our reciprocated services in exchange terms, while commercial actors who want to establish their arm’s length relationships often take pains to do the opposite.

In the realm of theory, exchange figures explicitly in the standard textbook definitions of two of the most important concepts for socioeconomic theorizing: market and commodity. Debra Satz aims to capture the common understanding when she characterizes markets as “institutions in which *exchanges* take place between parties who voluntarily undertake them.”⁴³ And as Friedrich Engels famously wrote, “to become a commodity, the product must be transferred to the other

-
39. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 58 cmt. a (AM. LAW INST. 2011) (“Subsections (1) and (2) describe features of the common law of property that yield the transitivity of ownership rights. If A has a right to restitution of X in the hands of B, and B obtains Y in exchange for X, A has the same rights in the substitute as in the original.”).
40. *Comm’r v. Duberstein*, 363 U.S. 278, 285 (1960) (“[W]here the payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it.” (quoting *Robertson v. United States*, 343 U.S. 711, 714 (1952))).
41. *Salman v. United States*, 137 S. Ct. 420, 423 (2016) (describing how insider trading liability may be found “where the tipper receives something of value in exchange for the tip”); *Dirks v. SEC*, 463 U.S. 646, 664 (1983) (holding that a breach of duty may be inferred from “a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter”).
42. See RICHARD HYLAND, *GIFTS: A STUDY IN COMPARATIVE LAW* 129-32 (2009). I am indebted to Hyland’s monumental work, but would like to register a minor, but important, quibble with his suggestion that the anthropological definition of gift is different from the legal one. More specifically, he says that if the law were to have adopted the anthropological definition it may have defined gift as “the transfer of an object in the context of a relationship that implies obligations to give, to receive, and to reciprocate.” *Id.* at 128. He is of course referring to Marcel Mauss’s classic work, but Mauss is clear that he was describing a conceptual scheme that didn’t differentiate, as ours does, between the notions of gift and *quid pro quo* exchange. In other words, notwithstanding the title of his work, Mauss is admirably clear, as we would put it today, that the practices he describes do not reflect a different *conception* of our concept of gift, but rather a different *concept* altogether. See MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* 93 (W.D. Halls trans., Routledge Classics 2002) (1950) (“The terms that we have used—present and gift—are not themselves entirely exact. We shall, however, find no others. [The] concepts of law and economics that it pleases us to contrast . . . it would be good to put them into the melting pot once more. We can only give the merest indications on this subject. Let us choose, for example, the Trobriand Islands. There they still have a complex notion that inspires all the economic acts we have described. Yet this notion is neither that of the free, purely gratuitous rendering of . . . services, nor that of production and exchange purely interested in what is useful. It is a sort of hybrid that flourished.”).
43. DEBRA SATZ, *WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS* 15 (2010) (emphasis added) (citing Samuel Bowles, *What Markets Can—and Cannot—Do*, CHALLENGE, July/Aug. 1991, at 11). Defining markets in terms of exchange is prevalent. See, e.g., JASON BRENNAN & PETER M. JAWORSKI, *MARKETS WITHOUT LIMITS: MORAL VIRTUES AND COMMERCIAL INTERESTS* 4 (2016) (“A market is a relationship where the mode of interaction is consensual exchange. Broadly speaking, a market is the voluntary exchange of goods and services for valuable consideration.” (footnote omitted)).

person, for whom it serves as a use-value, through the medium of exchange.”⁴⁴ And yet the concept of exchange itself has received practically no attention from theorists working on these topics, an omission that has not only rendered our theoretical grasp of markets and commodities deficient, but that has also stood in the way of efforts to settle the normative question of whether or not certain goods and services ought to be for sale. In particular, while participants in debates about market structures—either writ large or concerning the commodification of specific, controversial goods and services—often take for granted a close connection between exchange and instrumental motivation, the nature of the relation is never articulated or clarified, and certainly never argued for, making it difficult to determine whether certain objections presuppose features of exchange that are merely contingent aspects of contemporary markets, or whether the objections run deeper.⁴⁵

Thus, notwithstanding its great theoretical and practical significance, it remains obscure what it takes to subsume two performances under the exchange concept such that we may truly say of each that it was done in exchange for the other. In what follows, I will fill this gap by providing an account of quid pro quo exchange that seeks to characterize the relation between the two performances (or, in other words, that seeks to elucidate the middle term of the quid pro quo formula). On this view, quid pro quo is a normative concept that makes essential appeal to the notion of debt. In brief, acts stand in an exchange relation, according to this account, when the parties regard those acts as satisfying two conditions⁴⁶: first, that each satisfies the debt incurred by the other, and, second, that after the sequence of acts neither party shall owe the other anything on account of the other’s act. That is, two acts constitute an exchange when it belongs to the mutual understanding of the parties that they will each be “all paid up” as far as those acts are concerned once they are completed. I will call the first condition “Reciprocal Debt Satisfaction,” and the second condition “No Residue.” These conditions are individually necessary and jointly sufficient for the relation of reciprocal remuneration, the traditional conception of a bargain. The appeal to debt in the first condition supplies me with motive and opportunity to provide an account of that most interesting species of obligation, every bit as important and neglected as exchange itself. Although the significance of debt obligations transcends the narrower context of exchange, it is, I believe, our failure to come to terms with the former that has stood in the way of an adequate understanding of the latter.

Although this account is chiefly motivated by the counterexamples to competing theories, it is reinforced and illuminated by a particular genealogical explanation that sees the quid pro quo exchange form as an attempt to provide a practical solution to a practical problem. I am not the first to explain the exchange form by appeal to a problem it was in some sense designed to solve. Indeed, Holmes’s motivational account of exchange may be seen as the natural culmination of a

44. 1 KARL MARX, *CAPITAL* 131 (Ben Fowkes trans., Penguin Classics 1990) (1867) (definition inserted by Engels).

45. For recent criticism of markets (whether markets generally, or only in specific goods) that emphasizes the role of instrumental motives in exchange, see especially ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993); G.A. COHEN, *WHY NOT SOCIALISM?* (2009); and MICHAEL J. SANDEL, *WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS* (2012). Brennan and Jaworski base their defense of markets on the contingency of certain of the objectionable features of markets, but rest their case partly on the testimony of historical anthropologists rather than on a philosophical account of exchange. BRENNAN & JAWORSKI, *supra* note 43.

46. Once again, I am here using “acts” in its broad sense to refer to courses of conduct that might consist of some combination of acts or omissions. I will dispense with this disclaimer henceforth, allowing context to clarify when this sense is intended.

line of thought that can be traced to the practical predicament of two *fictive* farmers, creatures of David Hume's imagination.

As everyone knows, harvesting corn is a two-person job, the timing is sensitive, and you, a farmer, need someone to help you harvest corn today. As it happens, I'm also in the business of raising corn, and am well equipped to provide you with the help you need. However, there's a catch. For, as Hume puts it, "I have no kindness for you, and know that you have as little for me." Put differently, we are "mutually disinterested," in the sense that, as Rawls would later put it, each of us takes no interest in the other's interests. To be sure, I wish you no harm and would even sympathize with your plight if your corn were to wither. Nevertheless, you are a stranger to me – neither family nor friend, well outside my "narrow circle" of intimates – and I am neither inclined nor otherwise disposed to "take pains" merely because doing so would promote your interests or satisfy your desires. And the same goes for you and your attitudes towards me. And all of this is mutually known between us.

However, while you need help with your harvest today, I am going to need help with *my* harvest tomorrow, help that *you* will be in a position to provide. Moreover, I take it to be in my *own* interest, an interest I am thoroughly disposed to promote, to help you with your harvest today if doing so would reliably lead to your helping me tomorrow. And the same goes for you, and your perception of your own interests. So we should strike a deal, right? I help you with your harvest today and in exchange you will help me with my harvest tomorrow. Hume's main point is that if left to our natural devices – that is, to our natural, non-artificial, motives and dispositions – we (clear-eyed mutually disinterested farmers) would be unable to strike this deal, since we would be unable to generate the necessary assurances. "The seasons [would] change; and both of us [would] lose our harvests..." This is the predicament of the farmers. This predicament is overcome thanks to what Hume calls artificial motives and dispositions – most prominently, by resolutions made possible by the convention of promising.

I would like to shift the focus away from the role of promising in facilitating exchange and consider instead the role played by exchange in bringing about the pair of services. Let's introduce the term "reciprocity" to refer to all cases involving bilateral services performed by discrete individuals or groups – each side serving the other – where at least one of those services bears some important role in the explanation of why the other was provided. The first basic point is that if "reciprocity" refers to the genus, then exchange is not the only species. To be sure, we sometimes use the term "exchange" in an extended sense that coincides roughly with reciprocity – indeed, that even extends beyond it. For example, we might speak of an exchange of words, kisses, gifts, even gunfire. But note that we would not say, in these cases, that I uttered my words in exchange for your uttering your words. Likewise, some might use the term "exchange" any time someone deliberately chooses between incompatible alternatives and thereby makes a tradeoff. Thus, when I give half my dinner to my dog to get him to stop barking, we might say that I exchanged half my dinner for the dog's silence. But in this sense of "exchange" even a castaway on a deserted island would be able to carry out an exchange, as when he forgoes an afternoon swim in order in order to make a beautiful sand castle. Indeed, even my dog would be able to perform an "exchange" in *this* sense, on the plausible assumption that dogs can choose between incompatible alternatives. Yet, as Adam Smith observed, in his famous discussion of the species of exchange of interest to

us, “Nobody ever saw a dog make a fair and deliberate exchange of one bone for another with another dog.”

As I have said, exchange in the narrow sense – quid pro quo exchange, that is, doing one thing in exchange for the other - is only a species of reciprocity, and should not be conflated with the more general category. Indeed, Hume’s discussion contains examples of two other species of reciprocity that are distinct from quid pro quo exchange.

First consider the natural motive of gratitude and the disposition to return genuine kindness with kindness. Hume argued that gratitude would be of no help to the corn farmers. However, this was owing to a special feature of the case – namely, the farmers’ mutual understanding of their mutual disinterest. For Hume, like many others, thought that gratitude is sensitive to the motives of the benefactor: at the very least, when it is overt that help is being offered solely as a way to advance the helper’s own *independent* ends, and that the help would not have been offered otherwise, then gratitude cannot be expected. For this reason, Hume argues, the farmer who is in a position to help first cannot reason as follows: I will help him harvest, because if I do, then he’ll be grateful and will in turn help me. Since the mutual knowledge of the farmer ensures that such calculations would be transparent, the gratitude would not in fact be forthcoming.

However, Hume did not for a minute deny that gratitude *can* underwrite reciprocal services, and neither should we. For he believed, correctly, that service can be motivated by care or concern for the beneficiary or for the sake of a valuable personal relationship; and such service can give rise to gratitude, which in turn can be expressed in the form of a reciprocal service. If you help me in my hour of need for the right reasons, I might do something nice for you in a gesture of gratitude. Reciprocal services, but not an exchange.

And this is not the only form of reciprocity that stands as an alternative to quid pro quo exchange. To take another important example, individuals or groups might adopt “tit for tat” policies that are insensitive to the motives of the benefactor and operate independently of the sentiment of gratitude: that is, people may openly adhere to policies of responding in kind – in particular, of returning benefit with benefit, irrespective of the motive of the benefactor and without any regard for whether they do or should feel grateful. As Hume himself observes, it will frequently be in the interest of parties to adopt such policies as a way to keep the benefits rolling. If two parties adopt such policies, an open-ended chain of good turns can result: I help you, which leads you to help me, which leads me to help you, with no end in sight. Again, we have here a form of reciprocity, but no quid pro quo exchange. This recognition that quid pro quo exchange is but a species of reciprocity raises the question of its distinctive features. And this is, I have suggested, a question well worth asking.

As we have just seen, Hume offered a genealogical account of *promising* according to which the practice developed to facilitate exchanges between mutually disinterested parties. He did not, however, give any general characterization of exchange itself. However, others, working in his shadow, used his discussion as the basis of such a general account of exchange. Broadly speaking, they have adopted two approaches: the first is to directly build the attitudes of mutual indifference into an account of exchange, such that it follows from the fact that an exchange has

occurred that the parties to the exchange take one another to be mutually indifferent in the manner of Hume's farmers.

This is a mistake, but one that several important thinkers have made and that continues to hamper thinking about markets. H.A. Prichard, for example, in a short article on exchange, argued for the view that *all* exchanges between rational actors necessarily involve at least one promise to perform.⁴⁷ The heart of Prichard's argument for this conclusion is the premise that if a party to an exchange is not willing to give away his goods to the other party *for free*, then, in the absence of an obligation, he should not, if he is rational, be willing to give away his goods merely because the other party has now handed over some of *her* goods.⁴⁸

Prichard is here assuming that parties to an exchange take one another to be mutually disinterested. Absent that assumption, it does not follow from the fact that I wouldn't, as things stand, give you the goods for free that I wouldn't give them to you after you had given something to me. For, consider: I may like you, want to help you by giving you the goods, but be unwilling to do so because the sacrifice of parting with them would be too great. In lean times, I may be unwilling to give you my last apple, despite my care for you. But if I were richer by one banana, if I had one more piece of food in my cupboard, then giving you the apple might *not* be too great a sacrifice and I'd be happy to do it, as I would be happy to help. To be clear, this is not offered as a counterexample to Prichard's conclusion that obligations are indispensable to exchanges, or even to the premise that exchange entails attitudes of mutual disinterest, but only to show that, in arguing as he does, Prichard implicitly helps himself to the premise that parties to an exchange are known to be mutually disinterested.

Of course, Prichard's premise *should* be rejected. For it is perfectly possible, as a conceptual matter, for someone – a cobbler, say -- to openly care about a particular customer, to be disposed to take substantial pains for their benefit, and still insist on getting something in exchange for a particular service. This can happen for many reasons. For example, a service provider might need to charge at least some of their customers, and not wish to discriminate between their customers on the basis of their affections.

There is a second, more promising and more influential way of generalizing from Hume's famous discussion to produce an account of exchange. This involves focusing on the idea that each farmer's service is *incentivized* by the other's. As it happened, Hume's farmers needed the incentive because, being neither friends nor family, they lacked the kind of care and concern that would otherwise generate a motive to serve. But one may use the idea of reciprocal incentive to fashion an account of exchange that does not build in these attitudes of indifference. Adam Smith, in the famous second chapter of the *Wealth of Nations*, attempted such a tack. In this chapter he more or less repeats Hume's account of the farmers' predicament (that is, the predicament caused by our confined generosity together with our need for services from those outside our narrow

⁴⁷ [Prichard, "Exchanging"]

⁴⁸ "But though it is possible for X to resolve to hand over the apple anyhow [i.e., for free], he cannot resolve to do it if, i.e. only if, I have handed over the banana. *For ex hypothesi if X had not resolved to hand it over before, the knowledge that I have handed over the banana would not get him any nearer resolving to hand over the apple.*"

circle) and uses it to furnish not an account of promising but rather an account of exchange, based on the idea that exchange is a way of *incentivizing* the services of others.

“In civilized society he stands at all times in need of the co-operation and assistance of great multitudes, while his whole life is scarce sufficient to gain the friendship of a few persons. In almost every other race of animals each individual, when it is grown up to maturity, is entirely independent, and in its natural state has occasion for the assistance of no other living creature. But man has almost constant occasion for the help of his brethren, and it is in vain for him to expect it from their benevolence only. He will be more likely to prevail if he can interest their self-love in his favour, and shew them that it is for their own advantage to do for him what he requires of them. *Whoever offers to another a bargain of any kind, proposes to do this: Give me that which I want, and you shall have this which you want, is the meaning of every such offer*; and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of. It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest.”

While Smith here attempts to characterize an exchange offer, a more plausible version of an incentive based conception of exchange focuses on the relation between the services themselves – that is, on the instrumental motives that result when the incentives are effective. In what follows, I will focus on this account, though I note that most of my arguments apply to Smith’s account as well. The link between incentives and instrumental motivation is, I hope, apparent. When I dangle a carrot before you so as to elicit a service, and the incentive is effective, you act at least partly *in order to* get the carrot. If the services in an exchange each serve as incentive for the other, then, the thought goes, each service is done at least partly as a means of inducing the other service.

According to the incentive-conception, then, exchange solves the problem of how to extract services from those who require incentive – in particular, from nonintimates who, bereft of the care and concern that might otherwise provide a motive, lack sufficient incentive to lift a finger. On this view, quid pro quo exchange solves this problem by furnishing others with an incentive to serve – namely, by sweetening the deal – and it is this function that explains its features.

Although it is of course true that we commonly resort to offers of exchange to extract services from those who require an incentive, this is not particularly illuminating as an explanation of the distinctive features of the exchange form. For one thing, we may often care a great deal about the fates of people who lie beyond our narrow circle and yet reasonably insist on getting something in exchange for our services to them. More importantly, quid pro quo exchange is hardly distinctive in being a form or norm of reciprocity that can be used, given the right circumstances, to extract services from those who are not disposed to help out of affection for the beneficiary or other benevolent motives. As I have noted, quid pro quo exchange is a distinctive species of reciprocity, and it is hardly the only one that can be used to help elicit favors from self-interested strangers – a fact made vivid by the distinctive intertribal transactional practices brought to light by Marcel Mauss, as well as by the manifestly nonaltruistic, yet occasionally effective, adoption of tit-for-tat policies in certain iterated game scenarios.⁴⁹

49. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (2d ed. 2006); MAUSS, *supra* note 42.

While the problem singled out by Hume's and Smith's accounts does not illuminate the distinctive nature of quid pro quo exchange, there is another problem that does. This problem, which is not only solved by exchange but also explains its distinctive features, is that of facilitating the giving and taking of beneficial services without incurring lasting bonds and responsibilities—duties that might otherwise be generated if services were provided gratuitously. In this view, it is the applicability of expressions such as “we're good” or “we're done” in the wake of the performances that is the hallmark of exchange, not the inducement of services from those who are indifferent to our wishes or welfare. This function explains, most obviously, the significance of the second condition of the account, No Residue, as that condition explicitly states, as an element required if the parties' understanding is to constitute an exchange agreement, that in the aftermath of both performances there will be no remaining obligations owing to either performance. It also sheds light on the first condition, Reciprocal Debt Satisfaction, for when services are rendered in the course of an exchange, the debts of gratitude that otherwise might arise if the services had been gratuitously rendered are displaced by payment obligations that are reciprocally satisfied.

A. The Motivational Theory of Exchange: A Critique

Before introducing and defending the remuneration theory of exchange, I will consider and reject the reciprocal-inducement alternative. As we have seen, the prevailing doctrinal orthodoxy (reflected in the Second Restatement) appeals to the reciprocal-inducement theory of exchange as the basis of the reciprocal-inducement account of consideration: if a promise must stand in an exchange relation to the promisee's act (whether counterpromise or performance), and the exchange relation is equivalent to the relation of reciprocal inducement, then it follows that the promise must stand in the relation of reciprocal inducement to the promisee's act. Thus, while I will, in the next Part, offer reasons to reject reciprocal inducement as a theory of consideration on grounds of justification and fit, this Section's rejection of reciprocal inducement as a theory of exchange will serve to undermine the textbook derivation of the corresponding theory of consideration.

I will first state the motivational theory in its strongest form by refining a rudimentary but intuitive formulation into a more sophisticated and plausible one. According to the simplest version, *B*'s act *X* and *A*'s act *Y* stand in a quid pro quo relation if each is done with the aim—at least the partial aim, as there may be other motivating reasons too—of bringing about the other. Note that this simplified definition is subjective, in the sense that satisfying it requires actually possessing the relevant motives. The first modification will be to recast the condition objectively—to require the manifestation, rather than the possession, of the motives in question. The reason to prefer the objective version is simply that it better accords with our intuitions about the cases. No one would deny that in an ordinary sale of goods for money, the transfer of the goods and payment of the money stand in a quid pro quo relation.⁵⁰ And yet it is not difficult to conjure cases where

50. Even Williston—whose dual commitments to Langdell's definition of consideration and the remuneration conception of exchange led him to the tortured position that each promise in a bilateral sales contract is payment for the other—did not deny that the fulfillments of those promises *also* typically stand in payment relations to each other:

Doubtless it is almost universally true that the performance promised by one party to a bilateral agreement is intended as the consideration for the performance on the other side. A double exchange is contemplated. Promise is the price or exchange for promise and later performance for performance, but this is not always true.

the actual presence of the relevant motives is lacking. For example, *B* might order something from *A*'s store solely because she knows *A* could use the money and will not accept handouts. In this case, the delivery of the goods (goods that *B* disposes of as soon as they arrive) is a side effect, not an aim, of *B*'s transfer of the money. If the goods had gotten lost in the mail, none of *B*'s aims would have been frustrated. Hence the modification to an objective formulation.

To motivate the second modification, let us consider bilateral sales agreements that specify, as they often do, the sequence of performances (such as payment upon delivery). Supposing that performance *X* (delivery of the goods) comes before performance *Y* (payment of the money), we cannot say that the latter was done in order to bring about the former. After all, the goods had already been received by the time payment was tendered. It is not difficult to modify the theory in light of such cases; the key is to realize that although *Y* was not done with the aim of bringing about *X*, it was done knowingly in fulfillment of an obligation that was itself assumed in order to bring about *X*. Accordingly, we must say that act *X* stands in a relation of reciprocal inducement to act *Y* if each is done with either the apparent aim of bringing about the other or (knowingly) in fulfillment of a commitment which was itself undertaken with the apparent aim of bringing about the other.

Further questions arise for the reciprocal-inducement theory of exchange, most importantly whether it is a necessary condition of exchange that either or both parties be (apparently) willing to perform only if they expect to get something in return. But we need not address this further question of whether a threat to withhold performance unless payment is rendered is a necessary feature of an exchange in order to offer decisive counterexamples to the theory. Indeed, the theory provides neither necessary nor sufficient conditions for quid pro quo exchange (with or without this extra condition). I will begin by challenging the sufficiency claim, showing that the theory is too weak (in that it is overinclusive).

Consider, first, the case of two individuals who are considering whether to enlist in the armed forces. *A* and *B* are close friends, and each would rather enlist in the army (enroll in the club, jump off the cliff, etc.) than not enlist at all, *provided that the other enlists as well*; but each would also rather not enlist than enlist if the other does not. In such circumstances, each might commit to enlisting so long as the other does—a commitment manifested by a firm handshake after a series of “I will if you will” pronouncements. They execute the plan, and each enlists. I assume that no one, least of all *A* and *B*, would say that their respective enlistments constitute a quid pro quo—that is, were done in exchange for the other. And yet the reciprocal-inducement conditions are plainly satisfied, as would be the further condition that each would not have enlisted absent the expectation that the other would too.

For another important example, consider a loving aunt who, wishing to encourage her nephew's growing interest in fine art, offers to gift him thousands of dollars provided that he promises to use the money to purchase art (and not wine, diapers, or other things). The nephew accepts the

Samuel Williston, *Consideration in Bilateral Contracts*, 27 HARV. L. REV. 503, 504 n.2 (1914). Williston's caveat is designed to accommodate those contracts, such as insurance or surety contracts, in which a party will be called upon to perform only given some further condition that may not come to pass. *See id.* (“If *A*. promises *B*. to guarantee a debt of one hundred dollars due *B*. from *X*. in return for *B*.’s promise to *A*. to guarantee payment of five hundred dollars due *A*. from *Y*., the performances are in no sense in exchange for one another, or the consideration of one another, and yet there is a contract.”); *see also infra* note 76 and accompanying text.

generous offer by making the promise, and the two proceed to follow through on their commitments: the aunt transfers the money, and the nephew uses it to enhance his collection. The question to consider is whether the conditions of reciprocal inducement have been satisfied by what is patently a gift transaction. Now, there are certainly cases where someone makes a conditional gift offer in the avowed hope that it will be rejected. (For instance, “I’d prefer if you found someone else to help you; however, I’ll do it if you want me to, so long as you promise to hold the ladder while I’m up there.”) In such cases of reluctant gift offers, the offeror manifestly lacks the aim of inducing acceptance. But there are also cases where a gift offer is made eagerly—that is, with the hope and aim of getting the offeree to accept—and we may suppose that the aunt’s promise to her nephew belongs to this class. More exactly, the aunt makes the promise with the aim of getting her nephew to buy art, and goes on to transfer the money for the same reason (and also in fulfillment of her promise). Turning to the nephew, his purchase of the art is made in fulfillment of a promise that was itself made with the aim of getting his aunt to transfer the money. So the money transfer and the nephew’s purchase satisfy the conditions of the reciprocal-inducement theory of exchange. And yet the execution of this agreement does *not* involve a bargain or quid pro quo exchange by ordinary lights, and thus the case serves as another counterexample revealing reciprocal inducement to be too weak.⁵¹

Turning to the necessity claim, the reciprocal-inducement theory of exchange is also too strong (in that it is underinclusive). A student looking for bookshelves frequents a Vitra store to purchase the iconic midcentury design. He makes several inquiries to the store manager, whose enthusiasm diminishes with every question. Eyeing the student, he reaches the conclusion that the student is unlikely to be able to afford the exorbitantly priced item. Allowing his annoyance to get the better of him, he taunts the student, revealing his incredulity in explicit terms. Indeed, the manager is so sure of the student’s modest financial position that he commits to selling the piece to the student at a significantly discounted rate, feeling certain that the student will be unable to purchase the item, even at the lower rate, before the offer expires. As it happens, the student’s appearance is not reflective of his financial condition. Reaching into the pockets of his (stained) pants, he produces the money and, with relish, accepts the offer. The manager is bound and must deliver the shelves at the lower rate (even if it will cost him his job). A sale has occurred, and the ensuing delivery of the shelves and payment of the money constitute a quid pro quo. Yet the manager performed only because he was bound by a commitment that he manifestly undertook for reasons other than a wish to receive the student’s money. Indeed, his aims, actual and apparent, were frustrated when the

51. I digress to observe that each of the previous two cases also serve as counterexamples to the weaker, and less plausible, “I will if you will” theory of exchange—discussed *supra* note 35—according to which two acts stand in an exchange relation just in case they are executions of an “I will if you will” agreement. Indeed, even the reluctant gift offer case constitutes a counterexample to the “I will if you will” theory, even though it can be handled by reciprocal inducement. On the other hand, the next counterexample is effective only against reciprocal inducement, and not against the “I will if you will” account.

student accepted the reckless offer.⁵² The conditions of reciprocal inducement are not met and are therefore too strong, ruling out genuine instances of exchange.⁵³

B. Remuneration Theory of Exchange: A Defense

By contrast, the remuneration theory of *quid pro quo* locates the dispositive element of exchange in the (perceived) normative significance of the performances, and not in the actual or apparent motives that led the parties to perform them. Specifically, two acts constitute an exchange when the parties regard each act as payment for the other. The task that remains is to explain this relation of reciprocal payment. Again, I believe that it is our failure to articulate the distinction between debt and nondebt obligations that has been the source of our difficulty isolating and articulating the relevant element of exchange. For as we have seen, the mere presence of obligations, even mutual ones, is not sufficient to differentiate *quid pro quo* exchanges from the broader class of “I will if you will” agreements. Armed with the more fine-grained notion of debt obligation, however, we will at last be able to cordon off exchanges.

The first element of *quid pro quo*, Reciprocal Debt Satisfaction, invokes the notion of debt obligations. The category of debt is reflected in our ordinary language, which reserves the language of “debt” and “indebtedness” for some obligations (e.g., the obligation to repay incurred upon borrowing, or upon negligently damaging another’s property) while withholding it from others (e.g., the obligation to provide incurred upon procreating, or to go home for the holidays upon giving assurance to a nagging parent). More significantly, debt obligations are distinguished by a logical structure that can be given precise articulation.

To understand the mark of debt, we must distinguish between an obligation’s performance, fulfillment, and extinguishment conditions. An obligation’s performance condition, in my terminology, designates the element in common between two outstanding debts, each requiring payment of five dollars to the same individual. Intuitively, we may say that an obligation’s performance condition specifies the course of conduct called for by the obligation. An obligation’s

52. Observe the difference between this case and the case of so-called nominal or sham consideration. When you “buy” the family farm for a dollar, the scare quotes are entirely appropriate. In this case, by contrast, there is nothing problematic about saying that the student bought the bookshelves at a steep discount, and scare quotes are neither necessary nor proper. Indeed, any legal regime’s allowance of nominal consideration must be seen as an exception to, rather than a fulfillment of, a consideration, justified, if at all, by the manifested intentions to be *legally* bound.

53. A more important class of cases that could be used to establish the same point (the underinclusivity of the motivational conception of exchange) is the class of so-called “prove me wrong” contracts, where sellers of goods or services demonstrate their faith in their product by offering to provide something of value to anyone who can detect some particular flaw. Here, too, the offerors may be serious but are manifestly not aiming for acceptance. For a final counterexample, showing that the conditions of reciprocal inducement are too strong, consider an independently wealthy artist who finds the idea of selling art disgusting. Notwithstanding these views, the artist puts a painting on auction because he believes that it will only garner critical attention if enough people commit to buying it at a high price. This is a compromise for him, and so, in the wake of the auction, he executes a prior, publicly broadcasted plan and flushes the money down the drain as soon as the highest bidder’s check clears. Here, too, receipt of the money was only a side effect, and not an aim (actual or apparent), of the artist’s prior commitment to give the art to the highest bidder. If the check had not cleared, the artist’s apparent aims would not have been frustrated in the slightest. While the artist’s promise to transfer the art was made with the apparent aim of inducing the counterpromise, it was not made with the apparent aim of inducing the performance of that counterpromise (i.e., receiving the payment). And yet, when the money and the painting are transferred, they stand in an exchange relation.

fulfillment conditions are the necessary and sufficient conditions for fulfilling the obligation. When obligations are fulfilled, they are typically extinguished—that is, they cease to exist. But fulfillment is not the only way to eliminate an obligation. Just as the desire for food may be extinguished either by eating or by getting punched in the stomach, so too are there other ways of eliminating an obligation beyond fulfilling it. Some that are especially relevant in the context of debt are forgiveness (that is, waiver), set-off, death, and discharge in bankruptcy.⁵⁴

Armed with these distinctions, we may state the distinguishing mark of debt obligations. In brief, what serves to differentiate debts from other obligations is that satisfaction of a debt's performance conditions does not guarantee the debt's fulfillment (herein, the debt's satisfaction). Suppose, for example, that *B* has an outstanding debt in the amount of five dollars due to *A* on account of a loan. We cannot infer, merely from *B*'s payment of five dollars to *A* (that is, merely from the satisfaction of the performance conditions), that *B* has satisfied the debt. After all, *B* may be paying the purchase price to acquire additional merchandise from *A*, or *B* may be satisfying some other preexisting debt owed to *A* (or to some third party who directed payment to *A*). This, of course, raises the question of just what is needed, beyond performance, to satisfy a debt. What is needed to fulfill a debt obligation is not just performance, but performance in satisfaction of *that* particular obligation and not some *other* debt. This distinguishing feature of debt—that is, the distinctive mode of self-reference that figures in the fulfillment conditions—furnishes the possibility of accumulating multiple debts, each calling for the same conduct, and explains ordinary strictures against double counting (for instance, that a single payment of five dollars cannot satisfy two five-dollar debts). This, in turn, raises the question of how one performs in satisfaction of some particular obligation. But before we address this question, let us first consider the contrasting case of nondebt obligations, as well as an important objection to my position.

Although gratuitous promises or assurances can, I believe, generate debts, they often do not, and so we may look to them for illuminating, contrasting examples. In these cases, there is usually no distinction between an obligation's performance and fulfillment conditions. This is because there is typically no self-referring element in the obligation's fulfillment condition—that is, no reference to "*that* particular obligation" within the conditions of fulfillment—which means that there will be no question raised about double counting, and no possibility of stacking one such obligation on top of another.⁵⁵ If I gratuitously assure someone that I will be present at a certain event, or that I will sing a certain song at a karaoke party, or that some child will have lunch money in their pocket before setting off for school, whether I have done these things is usually all we need to know to determine whether I have fulfilled the obligation. Of course, this is not to say that the reasons for which I followed through (or, more to the point, my conception of my own performance) are utterly irrelevant in such cases—they will be most relevant for an assessment of my character and will indicate, in particular, whether I take my obligations seriously. (Additionally, depending on the case, my motivating reasons for conforming may also cast light on my level of care and concern for the people who have reasonably relied on me.) But these are

54. I don't mean to suggest that these are always possibilities—whether they are will depend on the subject matter as well as on the rules of customary or legal regimes. But when they are possible, they are alternative ways, distinct from fulfillment, of extinguishing obligations.

55. Of course, in particular cases one may build the self-referring element into the content of a gratuitous promise or assurance. This would be a way of generating a debt by a gratuitous commitment, and I certainly don't mean to suggest that no such gratuitous commitments give rise to debts.

distinct from the question of whether I have fulfilled the obligation to perform that I incurred when I gave someone my word, and, in particular, these matters will not raise the question of whether I need to perform again in order to conform to the understanding that had been reached when I gave my word.⁵⁶

In order to get a better grasp on the conceptual structure of debt, and in order to consider an objection to my account of quid pro quo exchange, we must introduce a distinction between performance conditions that are repeatable and those that are not. Repeatable performance conditions are ones that can, in principle, be satisfied more than once. Transferring a certain sum of money to a certain person is a ready example, but repeatable performances are not limited to money payments. I may owe you five (generic) bushels of corn or one hundred push-ups, and these too are examples of obligations with repeatable performance conditions. By contrast, if I am obligated to do something that can be done only once (for instance, destroy some particular idol, or perform some act at a particular moment in time), this would be an example of an obligation with a nonrepeatable performance condition. Given this distinction, some might be tempted to deny that the normative concept that I have identified as the concept of debt can apply at all to obligations with nonrepeatable performance conditions. After all, they might argue, the distinction between debt and nondebt obligations that I have drawn has practical import only where it is *possible* to accumulate, and satisfy, multiple debts, each one calling for its own rendition of the same type of performance. And since this is only possible with respect to obligations with repeatable performance conditions, the class of debt obligations ought to be viewed as limited accordingly.

Such a view of the scope of debt obligations certainly would be incompatible with my account of quid pro quo exchange: after all, the possible objects of exchange are surely not limited to repeatable acts (for instance, you may offer me a sum of money to smash some particular idol to smithereens, and we may complete the exchange). However, such a position regarding the scope of debt takes too narrow a view of the practical significance of an obligation's classification as debt, and should be rejected. To be sure, the advantages of being able to create debt obligations are particularly salient in cases involving repeatable performance conditions: when multiple debts of this kind are accumulated, each one can receive its own separate rendition of the same repeatable performance.⁵⁷ But, as I will show, this by no means trivializes the significance of the distinction between debt and nondebt obligations when the performance conditions are nonrepeatable. On the contrary, reflection on exchanges involving obligations with nonrepeatable performance conditions shows not merely that determining such obligations to be debts carries practical significance; stronger still, our intuitions concerning such cases can only be explained on the assumption that the relevant obligations, despite having nonrepeatable performance conditions, are genuine debts. Thus, consideration of these cases does not merely serve to rebut an objection against my position, but also constitutes a positive argument in favor of the thesis that all quid pro

56. For a powerful statement of this general position regarding obligations in general, see T.M. SCANLON, *MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME* (2010).

57. Indeed, this is presumably why the language of "debt" is most naturally invoked in reference to those debts with repeatable performance conditions. In my view, however, this should be seen as a superficial, if understandable, feature of the language, on par with the general tendency to restrict usage of the term "payment" to remunerative acts consisting of money payments (rather than the transfer of goods, say).

quo exchanges (whether involving repeatable performances or not) fulfill Reciprocal Debt Satisfaction.

My analysis of such cases relies on a final distinction between species of debt. I have said that in order to satisfy a particular debt obligation one must satisfy the obligation's performance conditions in satisfaction of *that* particular obligation and not in satisfaction of any *other* debt. "Any other debt" in this formula is susceptible to two interpretations, corresponding to two different species of debt. On the weak reading, "any other debt" means any other debt owed to the same creditor. On the strong reading, "any other debt" means any other debt *tout court*, whether owed to the same creditor or another one. There is no reason to think that all debts fit the same mold, and it will be a function of the understanding of the parties—at least when the debts are the product of consensual agreement—whether the debt is a strong or a weak one.⁵⁸

With this distinction in view, I will proceed to demonstrate the significance of the distinction between debt and nondebt obligations even in cases involving nonrepeatable performance conditions. Let us begin with a case. Suppose that *B*, a shop owner, has an interest in having snow removed from a common lot that her customers use for parking when frequenting her shop. *B* calls *A*, who has a private snow-removal business, and expresses an interest in hiring him to do the job. *A* quotes *B* his rate (listed on his website), and *B*, agreeing to pay at that rate, hires *A* to do the (nonrepeatable) job. *A* proceeds to do the job and sends *B* the bill. Before paying the bill, however, *B* learns that *C*, another storekeeper in the neighborhood with a similar, independent, interest in having the snow removed from the same particular lot, had independently hired *A* to do the same job and had already paid the bill that he, too, had been sent. The question, then, is whether *B* must pay *A*, or whether she can say, as a valid defense, "you've already been paid." Opinions will differ, but I speculate that many will say that the latter is a valid defense against *A*.⁵⁹ Rather than offering an opinion about whether *B* ought to pay, my present claim is merely that "you've already been paid" can be a valid defense in this case only given two conditions. First, each of *A*'s commitments, made to *B* and to *C*, must have been the undertaking of a debt obligation to remove the snow from the particular lot. Second, *A*'s commitment to *B* must have been the undertaking not just of a debt obligation, but of a *strong* debt obligation. Given this understanding of *A*'s commitments, *A* cannot fulfill both debt obligations by the single act of removing the snow from the lot, since a strong debt obligation cannot be fulfilled by an act performed in satisfaction of a different debt obligation. Accordingly, having already collected payment from *C* on account of completing his end of the deal (by removing the snow from the lot), *A* cannot also claim to have fulfilled the obligation owed to *B*, and hence cannot demand payment from *B* for having done so. This, in turn, shows the significance of understanding the obligation to perform as a debt even when the performance condition is nonrepeatable.

Defending the claim that *B* has a valid defense *only if* *A*'s obligation to her was a strong debt requires eliminating a competing explanation: the alternative theory that *B* has a valid defense because, before entering into the agreement with *B*, *A* was anyway planning to do the job to fulfill a previous commitment. This competing explanation can be rejected on two grounds. First, the original description of the case, while specifying that *C* was first to pay the bill, was silent about

58. Whether a tortfeasor's obligation to compensate a victim is a strong or a weak debt will be a function of either the practice (of the tort regime) or of the moral principles underlying the practice.

59. Notice, though, that this verdict still leaves open the question of whether *B* owes anything to *C*.

the sequence of contracting; accordingly, we may enrich the description of the case and specify that *B* was first to contract with *A*, even though *C* was first to pay. When we enrich the description in this way, the earlier intuition, I submit, loses none of its force. Second, we may establish the same point by introducing a variation of the original case. In this variation, before paying the bill *B* learns not that *C*, who has an independent interest in *A*'s doing the job, had already paid the bill that was sent to him, but rather that *A* (or *A*'s agent) had, prior to *A*'s contracting with *B*, already gratuitously committed to *C* that *A* would do the job. In this case, opinions might differ as to whether *A* is a scoundrel for not informing *B* about his prior plans and commitments (if *A* was, indeed, aware of them at the time of contracting with *B*). But what is clear enough is that *B* is obligated to pay *A*, notwithstanding *A*'s prior commitment. Whereas “you’ve already been paid” has considerable force as a defense, “you didn’t tell me you were going to do it anyway” does not.

As I stated, not everyone will share the judgment that *B* has a valid defense in the original case. Even those who resist this judgment, though, cannot plausibly deny either that *A*'s obligation is a debt or that this fact carries normative significance; rather, their judgment that the defense is not valid depends on the view that *A*'s obligation is a weak debt rather than a strong one. To see this, we need only consider another variant of the original case, in which *C* is not some other storekeeper with an independent interest in clearing the lot but rather is *B*'s agent (perhaps the store manager). Due to a failure of coordination (perhaps owing to the snowstorm), *B* and *C* each call *A* and separately enter into agreements with him to clear the lot. After doing the job, *A* sends bills to their separate addresses. Sometime *after* *C* has paid the bill that was sent to him but *before* *B* has paid the bill that was sent to her, they confer and become apprised of the situation. Surely in this case, “you’ve already been paid by my agent” is a valid defense. But this could only be explained if *A*'s obligation is understood as a debt, albeit a weak one.⁶⁰ If it were not, the prospect of “double counting” would raise no concerns, and *A* would be able to claim that he has performed his side of each of the two agreements. Only if the obligations are debts could *B* resist paying on the grounds that *A* cannot fulfill each of the two agreements with a single performance.⁶¹

60. These intuitions do not depend on *A*'s fraudulent misrepresentations: they do not change if we suppose that one of the contracts was conducted by *A*'s agent, who likewise suffered from a failure of communication with his principal, so that no fraudulent misrepresentations occurred. Likewise, we must not think that the intuitions can be explained by positing that only a single agreement was forged, despite the two job orders. It is untenable to say that there was only one “agreement in fact,” for the agreements have different properties (e.g., they occurred at different times). Indeed, in analogous cases involving repeatable performances—for example, when a failure of communication leads both a principal and her agent to each purchase the same fungible commodity on Amazon, even though only one is needed—there is no impulse to say that only a single agreement had been forged with Amazon. (Even if the mistake entitles them to money back—and it is by no means clear that it does—the explanation for this would not be that only one agreement had been forged; rather the explanation would be that they had *intended* to forge only one such agreement.)

61. There are many other cases of quid pro quo exchanges involving weak debt. One such case, important for contract law, involves three-party versions of “preexisting duty” cases, which are discussed in their two-party versions in Section III.B.2 *infra*. In such three-party preexisting-duty cases, discussed *infra* note **Error! Bookmark not defined.**, a promisor enters into an agreement to pay for a performance that the promisee has already contracted with a third party to provide. In some such cases, the promisor is aware of the promisee's outstanding obligation before making the commitment, but promises to pay for the performance, usually as a result of the promisee's credible threat not to fulfill the preexisting duty unless he gets more than what was originally promised by the third party. Sometimes such threats will be “fair and equitable,” as when the cost of performance has, unforeseeably, risen considerably. With respect to the “fair and equitable” cases, the promisor surely cannot use the “you’ve already been paid” defense to avoid making the additional payment, as she was apprised of the preexisting debt in advance. Since this defense is not available, we cannot say that the promisee's second promise to perform created a strong debt. But even in this case, we must conceive of the promisee's obligation as a weak debt rather than a nondebt obligation. After all, here too, if the promisor's agent had—due to a failure to

Having established the significance of classifying an obligation as a debt, even when the performance conditions are nonrepeatable, we are nearly done with our treatment of Reciprocal Debt Satisfaction, the first element of quid pro quo exchange. We are left only with the question of how to interpret the self-referential component in the definition of debt—that is, to determine what is needed to perform in satisfaction of *this* debt (and not some *other* one). We may immediately reject, as too demanding, a view that would require, as a condition of satisfying a particular debt obligation, that the performance be rendered with the *aim* of satisfying that particular obligation. After all, a debt could surely be satisfied when its satisfaction is just a foreseen side effect, rather than an aim, of the performance. (My aim, suppose, is solely that you have five dollars in your pocket on a given day, and I know that you do not accept handouts.) It is tempting, therefore, to retreat to a knowledge requirement, according to which the performance must be accompanied by an understanding—perhaps a manifested one—that in performing, the debtor is satisfying *this* obligation (and not some other debt). This might be right—and, if it is, it would be perfectly consistent with everything else I say in this Article. However, I believe that even this requirement is too demanding. It must be recalled that the motivation for differentiating debts from the broader class of obligations is *not* a concern with whether the agent has more virtuous mental states when fulfilling a particular class of obligations. Rather, the motivation is to explain why, in some circumstances, double counting of obligations is ruled out—that is, why multiple distinct obligations cannot always be discharged by a single performance.⁶² Accordingly, I suggest that we should simply interpret the “in satisfaction” clause of the fulfillment conditions as weakly as possible while meeting this motivating concern. Thus, if a debtor has only one outstanding debt with a given performance condition, then performance is sufficient for satisfaction of the debt, provided the debtor does not specify that his or her performance is *not* rendered in satisfaction of the debt (for instance, as when he specifies that the performance is the creditor’s birthday gift, or for some new merchandise). It is only when the debtor has multiple debts calling for the same performance that specification (that is, an expression of an understanding that one’s performance is satisfying a particular obligation) might be required. Even here, acts of specification may not be needed when custom or law dictates which performance pays off which debt.⁶³

Before turning to the second element, one more observation is in order. It is, I have said, a necessary condition of quid pro quo exchanges that the parties understand their performances as satisfying Reciprocal Debt Satisfaction, a relation I have tried to explicate. But it does not follow from any of this that the law’s decision regarding the *legal* rights and obligations that result from such understandings must perfectly hug the contours of the understandings themselves. For the law might have its own reasons for deviating from the parties’ own understanding even in cases

communicate with his principal—gone on to make the same deal with the same promisee (the one threatening not to do the job unless he received more), the promisee would not be entitled to collect from both the agent and the principal after completing the job. (And here, too, we needn’t suppose that the explanation of our intuitions has anything to do with fraud or misrepresentation. After all, let us suppose that one of the renegotiations was conducted with the *promisee’s* agent, who likewise suffered from a failure of communication with *his* principal.)

62. Very roughly, this double counting will be a relevant concern when the obligated performance is seen as in some sense a substitute for what the other party *gave* (in the case of contractual debts) or *gave up* (in the case of torts).
63. For example, a custom might adopt a first-in, first-out rule on which a given performance satisfies the oldest debt calling for a particular kind of performance if multiple such debts exist.

when it requires that understanding as a condition of enforcement.⁶⁴ So, for example, if the distinction between strong debt and weak debt is too refined to be easily ascertained, the law can treat all debt like weak debt.

Reciprocal Debt Satisfaction serves to explain why the nondonative collaborative agreements considered earlier (such as “I’ll enlist, if you enlist”) do not qualify as quid pro quo exchanges. When friends or members of preexisting co-operative units commit to plans involving the coordination of their activities, the ensuing obligations are not typically regarded as debts, and so do not typically give rise to problems related to double counting or to the possibility of stacking. While this first element states a necessary condition of exchange, however, it is not sufficient. The second element, as I have indicated earlier, specifies that the parties understand that, following the sequence of performance, no outstanding obligations (debt or otherwise) will remain on account of either performance. This second condition is not only motivated by the theoretical considerations regarding the function of the quid pro quo transactional form considered at the outset of this Part; it is also motivated, more concretely, by intuitions about particular cases.

One may show that the first condition is not sufficient by considering transactions that satisfy it even though one of the performances is mutually understood by the parties to constitute a gift. One sort of example involves nominal consideration (in jurisdictions that recognize such consideration). As I have already observed, when, merely in order to make a contract binding in law, one “sells” the family farm to a nephew for a dollar, the scare quotes are in order because there has been no genuine quid pro quo.⁶⁵ However, even in such a case, the parties may regard their performances as satisfying Reciprocal Debt Satisfaction. After all, it may be important to the donor that the transaction satisfies the prerequisites for legal recognition, which may include payment to the donor of the nominal amount agreed upon. Other conditional gift arrangements might illustrate the same point more vividly, as when a promise to give someone exclusive access to a huge tract of valuable land is made conditional only on the promisee’s promise to reimburse the owner for the costs generated by the former’s activities on the property (such as reimbursement for electricity bills). Depending on the context, the parties may reasonably insist that a quid pro quo has not transpired, even though the respective obligations would seem to stand in reciprocal debt relations. The promisee must make the reimbursement payments, and, in doing so, all strictures against double counting would seem to apply. Again, the common feature of these examples is that one of the performances in each case is regarded by the parties as a gift. On ordinary social understanding (and I do not mean nor need to defend these widespread understandings), gifts are precisely the sorts of transactions that generate lasting normative bonds—in particular, debts of gratitude or duties to reciprocate. Accordingly, No Residue is able to explain why such transactions are not genuine quid pro quo exchanges in spite of the debt

64. Even Seana Shiffrin, who has prominently criticized the law of contracts for allowing divergences between contractual obligations and promissory ones, acknowledges that divergence may be acceptable when there are “distinctively law-regarding grounds [for the divergence], such as the difficulty and expense of” enforcing the promise in a given case. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 733 (2007). I argue against Shiffrin’s position in Jed Lewinsohn, “By Convention Alone”: Assignable Rights, Dischargeable Debts, and the Distinctiveness of the Commercial Sphere (Nov. 2019) (unpublished manuscript) (on file with author).

65. See *supra* note 52.

relations.⁶⁶ More generally, No Residue ensures that in quid pro quo agreements, the exchanged performances are understood by the parties to give rise to no persisting debts of gratitude or duties to reciprocate.⁶⁷

According to the remuneration theory, performances constitute a quid pro quo because the parties to the agreement understand those performances to satisfy Reciprocal Debt Satisfaction and No Residue. But on what basis do the parties reach this understanding? In the case of the first condition, we might say that they understand their agreement itself to be the explanatory ground of the debts contemplated therein. That is, the reciprocal debt obligations that the parties recognize are the product of mutual assent to stipulated terms. In other words, the terms describe reciprocal debt obligations that the parties take to obtain in virtue of their assent. The more difficult question is how they reach the understanding captured by No Residue—namely, that no debts of gratitude persist in the aftermath of the performances. The reason this question is difficult is that debts of gratitude can be contested (with such phrases as “oh, it was nothing,” “it was a pleasure,” “I was planning to do it anyway”), but they cannot be created by fiat or eliminated by waiver.⁶⁸ So if it belongs to the parties’ understanding that the ensuing performances give rise to no such debts, it must also belong to their understanding that there are features connected with either the performances themselves, or their agreement to perform them, that preclude those debts from existing.

But what are these vitiating features? The mere fact that each party stands to gain from the execution of the agreement cannot be enough. To see this, consider two friends, *F* and *G*. *F* helps *G* edit *G*’s long article one weekend, while *G* helps *F* research wedding venues the following weekend. While the reciprocity these friends exhibit is hardly an insignificant feature of their relationship, the parties will not typically walk away from this sequence with *no* debts of gratitude; rather, at least in many cases, they will walk away with two. These debts, unlike commercial ones, are not only impervious to waiver but also unsusceptible to elimination via set-off. We may note that nothing changes at all if we add the fact that the parties agreed to this plan in advance. That is, the parties agreed to a plan involving two favors on successive weekends, provided that they do not adopt the plan with the understandings that constitute a quid pro quo agreement. And they may

66. While I have emphasized that the donee’s obligation can have the character of a debt, I am also assuming that the obligation undertaken by the donor can also have that character. Suppose that Smith, the owner of a valuable tract of land (Blackacre), agrees to gift to her friend Jones exclusive use rights to Blackacre (rights that have a high market value), on the occasion of Jones’s wedding, provided only that Jones agrees to reimburse Smith for any taxes that accrue from the transfer. Jones gratefully agrees, but, before performing, Smith incurs a debt (debt), owed either to Jones or to a third party, which can be satisfied by transferring to Jones the use rights over Blackacre (absent any commitment to reimburse for the taxes). If Smith transfers Blackacre to Jones in satisfaction of debt, she cannot also claim to have fulfilled her wedding day commitment, and, accordingly, cannot demand reimbursement payments from Jones for the taxes.

67. We may also note that fulfillment of No Residue does not entail fulfillment of Reciprocal Debt Satisfaction. To see this, consider again the case of the two friends who agree to enlist together in the army, and then subsequently carry out the plan. Here, debts of gratitude do not arise and No Residue is satisfied. The same may be true of many genuinely shared, mutually beneficial activities, like the execution of a plan to play tennis on a certain occasion.

68. This was recently emphasized by Barbara Herman. See Barbara Herman, *Being Helped and Being Grateful: Imperfect Duties, the Ethics of Possession, and the Unity of Morality*, 109 J. PHIL. 391 (2012). In conversation, Ben Eidelson has suggested to me a plausible explanation for the nonwaivability of debts of gratitude: the gratuitous waiving of such a debt would be pointless, since it would simply result in the creation of a new debt of gratitude, this time incurred by the preceding waiver. Of course, this supposes that the waived debt and the new debt would be identical in magnitude, an assumption that may be contested.

have subsumed the favors under a single plan for many reasons other than an understanding that each one is payment for the other. For example, subsuming both favors within a single plan may have been the only way to coordinate busy schedules, or may have merely reflected anxiety that the friendship was becoming too imbalanced. In many such cases, the friends will each walk away feeling appropriately grateful on account of the other's performance. Accordingly, we have not yet located the bases upon which the parties reach the understanding that satisfies No Residue.

This problem, I believe, explains the connection between quid pro quo exchange and instrumental motives—that is, between doing *X* in exchange for *Y*, and doing *X* in order to get *Y*. The connection runs very deep. One of the oldest surviving records of the oldest known Greek script (Linear B) is a report of an exchange transaction (“[fourteen female] slaves of the priestess” in exchange for “sacred gold”), and the term for “exchange” that is used (transliterated as “e-ne-ka,” typically translated as “on account of”) is a motivational one.⁶⁹ There are also common-law authorities within our purview that refer, albeit loosely, to the “price” and “motive” of a contract in a single breath, thereby drawing a connection between the notion of remuneration and that of inducement.⁷⁰ At the very least, no one would deny that there is a strong empirical generalization linking the exchange form and the apparent motives picked out by reciprocal inducement—that is, many or most exchanging parties in fact appear to perform or commit to perform partly in order to induce the counterparty's performance. But I believe that the connection is even stronger and of a conceptual nature. Although, as we have seen, the apparent motives that reciprocal inducement picks out are neither necessary nor sufficient for quid pro quo exchange, I submit that they often serve as the basis of the parties' understanding that satisfies No Residue. After all, on standard conceptions of gratitude, debts of gratitude are sensitive to the motives and attitudes that move a benefactor to confer the benefits. Accordingly, in many cases it is precisely each party's conception of the instrumental, nonaltruistic, motives of their counterparty that supports their common understanding concerning the absence of debts of gratitude. In these cases, parties who understand themselves to be “all paid up” following the sequence of beneficial performances also understand themselves, rightly or wrongly, to possess these instrumental motives and attitudes.

Several further observations are in order. First, the instrumental motives in question are not the only possible vitiating factors that can support the parties' understanding concerning the absence of debts of gratitude. Indeed, the earlier example of the student in the Vitra store is a case in point. The sale in that case demonstrated that reciprocal inducement is *not* a necessary condition of quid pro quo exchange. But notice that there are other features of that case to which the parties could readily appeal in reaching their understanding concerning the absence of debts of gratitude. Most obviously, it is not just that the manager was not trying, or expecting, to benefit the student or to satisfy his wishes; stronger still, what the manager was aiming for, and expecting, was to embarrass or expose the student by making an attractive offer he would be unable to accept.⁷¹

69. COLIN RENFREW, *ARCHAEOLOGY & LANGUAGE: THE PUZZLE OF INDO-EUROPEAN ORIGINS* 61 (1988) (“At Pylos: slaves of the priestess on account of [eneka] sacred gold: 14 women.”).

70. For example, Blackstone remarks that “[t]he civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal. This thing, which is the price or motive of the contract, we call the consideration” BLACKSTONE, *supra* note 21, at *446.

71. When the apparent motives picked out by reciprocal inducement do serve as vitiating factors, these apparent motives must correspond to the strengthened version of that theory, considered earlier, on which each performance would not have been given but for the fact that it would induce a reciprocal performance. This is because a debt of gratitude would still arise were a desired service rendered with the partial aim of promoting the provider's own

Second, while these imputed motives are strong enough to vitiate a debt of gratitude, they are weak enough to coexist alongside the noninstrumental valuing of one's service and one's counterparty, and do not entail or presuppose an attitude of indifference toward either the service or the counterparty. For example, a sculptor (or even a banker) may insist on receiving payment from a beloved customer only because she needs to support her own family, or because she does not wish to treat her customers differently on the basis of her affections, not because she treats either the customer or her own sculpture with indifference.

Although this completes the elaboration of the remuneration theory of *quid pro quo*, we may briefly consider a class of potential counterexamples. I have in mind cases involving *quid pro quo* transactions that nonetheless give rise to debts of gratitude. Some examples might include: a seller who gratuitously offers someone the opportunity to purchase something (at market rates) before offering the product to an eager public, or one who offers an individualized discount, or an editor's acquisition of a fledgling writer's first novel after all the other editors have passed. These cases can be dealt with in either of two ways. In some cases, we can distinguish between the performance under the contract and some other element of the transaction that gives rise to the debt of gratitude. This is obviously true, for instance, with respect to offers of first refusal—that they are distinct from the performance is evidenced by the fact that rights of first refusal can be separately purchased. In such cases, what we are grateful for is getting the first crack at the apple, which is given gratuitously apart from any *quid pro quo*, not for the subsequent *quid pro quo* transfer of merchandise at market rates. And No Residue speaks only to the performance proper. I submit that this strategy will serve to neutralize most putative counterexamples.

Nevertheless, I am prepared to accept that there *may* be cases where a debt of gratitude is generated by a performance in a *quid pro quo* exchange, even when the service provider would not have performed if he did not stand to gain. These cases will be fewer in number than we might at first think, especially once we take pains to distinguish between apt or intelligible gratitude, on the one hand, and gratitude that is in some sense required (on pain of rendering one liable to a charge of ingratitude), on the other, since only the latter could constitute a counterexample to my theory. Perhaps the case of the editor would be one example, though it seems that even here the recognition of talent in a writer, by way of making an offer to publish the work, would be distinguishable from the editor's performance under the ensuing contract—or the services of a brilliant surgeon or psychotherapist who changes the life of his or her patient for the better. In other words, perhaps in cases like these the service provided (that is, the service that is owed, and not something above and beyond the call of duty) is so meaningful to the recipient that it will generate a debt of gratitude even when the provider would not have provided those services if the recipient had not paid for them.

independent ends unless the provider *would not have performed* the service had it not been expected to promote his or her independent ends. This is defended at length in my book-length treatment of *quid pro quo*, see Lewinsohn, *supra* note **Error! Bookmark not defined.**, and is related to similar claims made by Seneca, see LUCIUS ANNAEUS SENECA, ON BENEFITS (Miriam Griffin & Brad Inwood trans., Univ. of Chi. Press 2011) (c. 60 C.E.), and Hume, see HUME, *supra* note **Error! Bookmark not defined.**, at 225-27, 331-37. In applying this to the case of exchange, some finesse is needed on the plausible assumption that not every exchange offer is represented as a final offer.

In some of these cases (if there are any), the recipient of the meaningful service may not have recognized, at the time the agreement was made, the debt they would come to incur. Such cases, too, pose little difficulty for No Residue, since it is the understandings at the time the agreement is made that are dispositive. But perhaps there are cases where, even at the time the agreement is made, the parties know, at least on some level, that a debt of gratitude will persist after the performances. What I would say about such cases is that they are only genuine instances of quid pro quo exchanges if the parties, at the time the agreement is made, look past the relevant debts in the way conversing adults sometimes look past disagreeable odors or sounds, choosing not to acknowledge what is blowing in the wind. In such cases, there may be a discrepancy between the official ledger, constitutive of the parties' shared understanding, and what they know but choose not to acknowledge—that is, they may act as though no debt of gratitude exists even if they know that it does. And, in such cases of discrepancy, the account I have offered follows the official ledger. To be sure, what I am calling the official ledger is in some sense a social and conventional artifact; but, then again, so are transactional forms.⁷²

Although I have claimed that Smith was wrong to view the extraction of services from strangers as the most basic feature of exchange,⁷³ he was right to see quid pro quo exchange as in some way alien to the sphere of friendship—a judgment that, I believe, is confirmed by prevailing social norms. For those in thrall to the reciprocal inducement conception of exchange, such attitudes might seem easy to explain: after all, is it not unseemly to instrumentalize a friendship, to use the fact that one is in a position to help a friend as a means to extract goods or services from them? Should the prospect of helping a friend really require external incentive?

While this explanation has a certain appeal, it does not withstand scrutiny. For one thing, as I have noted, requiring something in exchange for one's service is fully consistent with non-instrumentally valuing both one's service and one's counterparty. For another, we often do need additional reason if we are to help our friends on particular occasions, given our limited time and resources and our web of commitments. That is, often the fact that a friend, even a good friend, wants something from us isn't enough to get us to help, not because we're lazy or selfish, but because of all the countervailing reasons we have to pour our resources elsewhere, including on other friends. Additionally, by making a specific exchange counteroffer, we may inform or remind the friend that they are also in a position to help us, and what could be more in the spirit of friendship than turning a unilateral service into an occasion for mutual benefit? Most importantly, the fact that it is, in general, perfectly acceptable to ask a friend a favor shows incontrovertibly that there is nothing inherently wrong about using one's friendship as an occasion to procure services for oneself – that is, to instrumentalize one's friendship – so long as one is being transparent about one's motives.

The remuneration theory is able to render our norms intelligible, explaining why intimates have reason to be reluctant to resort to quid pro quo in their dealings with each another, even if such

72. The form of pretense at issue in this paragraph (one that occurs at the time the agreement is forged) is related to, and interacts in complex ways with, another familiar form of pretense involving exchange. It is an important social fact that parties to explicit exchange agreements sometimes attempt to obscure, or look past, the quid pro quo ("transactional") character of their relationship, not when the agreement is formed, but rather in the course of the ensuing performances. This is especially recognizable in the context of care professions, as well as so-called professions of higher calling, and might have understandable causes as well as mixed results.

73. See *supra* text accompanying notes **Error! Bookmark not defined.**-**Error! Bookmark not defined.**

reasons can be overridden in appropriate contexts. In particular, several aspects of quid pro quo exchange are prima facie at odds with the values of friendship. These aspects warrant a fuller discussion than I am able to give on this occasion, so I will simply articulate the elements of the transactional form that might be the source of concern, leaving it for another time to explain exactly why.

The distinguishing feature of quid pro quo, as I have described it, is that it allows the transacting parties to give and receive benefits without incurring lasting duties to reciprocate and debts of gratitude. But if friends view these residual obligations to one another as more than mere liabilities, but instead as valuable, albeit constraining, constituents to their valuable relationship, this would give them reason to choose a different transactional form than one which quite literally amounts to a concerted effort to nip such lasting obligations in the bud.⁷⁴ More generally, if the genealogical explanation I have suggested is on the right track, then quid pro quo is a transactional form that came into the world to facilitate a certain kind of arm's-length noninvolvement that would otherwise be difficult to achieve among givers and takers of wanted services. If this explanation is correct, it is little wonder that friends, whose lasting bonds and ties are a source of meaning and value, would want to employ a different form in their distribution of goods and services to one another.

The account I have offered is also well positioned to explain the exceptional cases in which friends appropriately employ the form in their dealings with one another. Many of these cases involve transactions that, for one reason or another, guarantee continued involvement and lingering debts. This is true, for example, of transactions involving gratuitous offers of first refusal, or of special discounts extended to individuals on the basis of friendship. In such cases, even if the exchanged performances themselves do not give rise to lasting debts of gratitude, the gratuitous elements of the transaction do, and the reasons friends have to avoid the form will be correspondingly diminished. In other cases, friends use the form to avoid debts that their friendship cannot bear. It is an interesting question why friends calibrate the degree of favors they are comfortable receiving to the strength of their bond, but it is undeniable that they do. When a friendship cannot bear the weight of a particular debt—for example, I would not feel comfortable accepting an offer from many of my friends for a rent-free sublease of their house or apartment, even if they are not in need and will be away for the year—the account that I have offered explains why the resort to exchange might be acceptable. For in cases like these, it is important to the friendship that the debt be avoided, and exchange provides the means of achieving that desirable outcome. Of course, even in cases such as these, we will often prefer to get the service from a stranger (for example, by consulting Craigslist or the Yellow Pages) rather than from an exchange agreement with a friend. This common preference likely owes to many factors, but one of them might be the wish to avoid having to communicate one's views about the limits of what the friendship can bear.

iii. two doctrines of consideration

In Part II, I articulated and defended a theory of exchange as reciprocal payment (or remuneration), distinct from the relation of reciprocal inducement (objectively construed). The

⁷⁴ [Cite to Raz, Scheffler, Owens]

present Part begins to make the case that a remuneration theory of exchange provides the materials for a consideration doctrine far superior along the dimensions of both fit and justification. Before discussing the problems with the orthodox approach, I will first introduce the alternative remuneration theory of consideration, which will enable us to compare the two versions of the consideration rule.

A. *The Remuneration Theory of Consideration*

The basic idea behind the remuneration theory is that fulfillment of the consideration requirement is, in the first instance, a function of the *terms of the agreement* (objectively interpreted)—and not of what may have induced the promisor, actually or apparently, to assent to those terms.⁷⁵ Specifically, as long as the parties assent to an agreement that appears to contemplate reciprocal payment relations, relations which may, in turn, be understood in terms of Reciprocal Debt Satisfaction and No Residue, the agreement satisfies the consideration requirement, regardless of what seems to have motivated the parties to lend their assent. Furthermore, the element of exchange in virtue of which an agreement satisfies the consideration rule may be found in the contemplated relation between the promised performances. In a typical bilateral sales contract, for example, the parties each assent to an agreement that not only requires the seller's delivery of the goods and the buyer's transfer of the money, but that requires each performance *as payment* for the other, with all the implications of this designation (such as those involving strictures against double counting) that were laid out in Part II. It follows from this that, so long as the agreement to which the parties assent contemplates payment relations, the consideration rule may be satisfied long before any payment has actually been made. So far as the consideration rule is concerned, what matters is that the parties have agreed to an exchange, not that an exchange has occurred.

75. In constructing this theory, I stand on the shoulders of the almost-forgotten Henry Ballantine. In a pair of extremely insightful law review articles from 1913 and 1914, Ballantine, a former student of Williston at Harvard who would go on to become a professor of law at Berkeley, bucked the emerging orthodoxy and maintained, as I do, that the consideration requirement governs the “terms of the bargain”—claiming, in other words, “[T]he rule of consideration is a mere test of the nature of the agreement, and the element of consideration may exist from the start in the nature of the agreement as a bargain.” Henry Winthrop Ballantine, *Is the Doctrine of Consideration Senseless and Illogical?*, 11 MICH. L. REV. 423, 432 (1913); *see also* Ballantine, *supra* note 16, at 132-33. Despite a brilliant paradigm shift and several forceful arguments against the orthodoxy of his (and our) day, Ballantine's articles, while garnering responses from the leading contract scholars of his day, had no significant impact on the development of the law. This poor reception was not entirely unearned, however, as Ballantine was unable to articulate the relevant feature of the terms or substance of the agreement in virtue of which it would qualify as a bargain and pass the consideration test. He frequently refers to “mutuality” and “reciprocity” as the essential elements—reflected in the title of his *Harvard Law Review* article, *Mutuality and Consideration*. For example, he says that “the doctrine of consideration is a not very successful attempt to generalize and reduce to a rule of thumb that reciprocity which must exist in an agreement to make non-performance a legal wrong on the part of the promisor,” Ballantine, *supra*, at 424, and that “[i]t would seem to be a sound principle of law which demands some mutuality or reciprocity of engagement as the basis of a contract,” Ballantine, *supra* note 16, at 132. When pressed to identify the species of mutuality or reciprocity, however, the best he could come up with was that “[a]ny mutual promises which contemplate the possibility of a required performance on each side constitute a contract, since they involve mutuality or reciprocity in the things promised.” *Id.* at 126. Contrary to Ballantine's intentions, this definition severs the link between consideration and bargain altogether, since, as I have already shown, the condition it states would be satisfied by all “I will if you will” agreements, including those commitments to plans that few would categorize as bargains. *See supra* Section II.A. Having recovered the concept of quid pro quo exchange, we are in a position to improve on Ballantine's account by offering a precise statement of the features of the (apparent) terms of an agreement that must be present in order to satisfy the consideration test.

Of course, nothing in the remuneration theory rules out the possibility that the parties may, on occasion, regard the promise itself—that is, the undertaking of an obligation—as constituting one side of the relevant exchange relation. When I buy an insurance policy, for example, my payment is arguably for the insurer’s incurring an obligation to reimburse in the event of some accident, not for any recovery that may or may not ever be made.⁷⁶ And the same is arguably true of other classes of contracts, such as the issuance of bonds (or other negotiable instruments) for value. The lesson here is that just as it is a mistake to single out the relation between the acts of assent as the exclusive site of exchange (in virtue of which an agreement may pass a bargain test), so too is it a mistake to focus exclusively on the relation between the promised performances.

With this in mind, we may advance the following statement of the consideration rule: a promise is supported by sufficient consideration if it can be inferred that the parties regard either the promised performance, or the promise itself, as standing in a relation of reciprocal payment to either the performance, or the promise, of the promisee.⁷⁷ This can be restated using the language of quid pro quo exchange: a promise is supported by adequate consideration if it can be inferred that the parties regard either the promised performance, or the promise itself, as standing in a quid pro quo relation to either the performance, or the promise, of the promisee.⁷⁸

[Note: I have removed sections on conditional gifts, contract modifications, and the rationale for the doctrine. With respect to the rationale of the doctrine, here is a brief summary, which is needed for the conclusion.]

The remuneration theory of consideration also has an intelligible rationale—one that enjoys substantial historical corroboration, and that provides a principled basis for the traditional exceptions in cases such as firm offers and guarantee agreements. As many have observed, friends and family members tend to shy away from the quid pro quo form in favor of other modes of reciprocity when conferring and receiving benefits among themselves.⁷⁹ This empirical observation receives support from the remuneration theory of exchange, which exposes the *reasons* friends and family sometimes have to avoid the exchange form.⁸⁰ This observed tendency, together with the contestable, but plausible, normative assumption that the law ought not to enforce promises between intimates unless those intimates expressly enlist the law, typically by invoking legal

76. Some might wish to resist this characterization and instead construe the insurer’s promised performance conditionally: that is, the insured pays the premium, and in exchange the insurer pays out coverage if a covered event occurs. (According to this construal, the insurer performs even if the covered event never occurs.) Adopting this alternative characterization would in turn allow us to replace the disjunctive definition of consideration with the following nondisjunctive version: *A promise is supported by sufficient consideration if it can be inferred that the parties regard the promised performance as standing in a relation of reciprocal payment to the performance of the promisee.* However, despite appearances, there is no reason to think that this version is any simpler. Indeed, the disjunctive formulation in the text may be reformulated nondisjunctively as follows: if the apparent terms of an agreement contemplate an exchange between the parties, then that is sufficient as far as consideration is concerned.

77. The phrase “it can be inferred” is meant to capture the fact that the definition is “objective” and does not require the actual subjective understandings.

78. This way of restating the test assumes that if the parties mutually understand their acts as satisfying the two conditions of reciprocal remuneration, then they also mutually understand one another as so regarding their acts. None of my substantive claims rely on this assumption.

79. See *infra* note **Error! Bookmark not defined.**

80. It also explains the exceptions to the observed tendency by exposing the reasons they sometimes have to use the form.

formalities at the time of formation, provides a rationale for the bargain requirement. On this interpretation, the consideration rule does not identify conditions that give the law *reason* to enforce a promise. That is, the rule does not rest on the normative position that a promise ought to be enforced *because of* its relation to a bargain. Rather, the point of the bargain requirement is to identify (however roughly) a class of promises—informal promises in social and domestic contexts—that the law has reason *not* to enforce, either because the law’s general reasons for enforcing agreements do not apply in these contexts or because features of these contexts override the law’s general reasons in favor of enforcement. This rationale not only renders the rule intelligible, but also explains why the law draws exceptions for forms of commercial commitment that, while not belonging to an exchange, tend not to be used by intimates (e.g., bills of exchange, surety agreements, etc). The rationale also receives significant historical corroboration. As I show, the modern (Langdellian) rule of consideration is not sensitive to social context, and so not up to the task of screening for informal social and domestic agreements. Accordingly, if the rationale is correct, one would expect that the adoption of the modern rule by legal authorities would lead to the introduction or invocation of some other doctrinal mechanism to perform this function. When we consult the historical record, this is indeed what we find. In particular, the legal-intent requirement (requiring an intent to establish legal relations as a condition of liability), or some variation of it, has been consistently wheeled in by legal authorities in both England and America to avoid enforcement of informal social and domestic agreements as soon as the modern consideration rule was adopted.]

conclusion

In offering the foregoing account of consideration, I have attempted to strike a path between two diametrically opposed modes of doctrinal analysis. On the one hand, I have eschewed a prominent “realist” understanding of the doctrine. On the other hand, I have avoided treating the doctrine as an embodiment of noncontingent principles of right. According to the realist understanding, a judicial finding concerning consideration amounts to no more than the statement of a conclusion—namely, that the agreement at issue is either enforceable or not—reached not by the application of an independently specifiable bargain requirement, but rather by the exercise of a broad discretionary power based on an open-ended list of factors such as good faith, reliance, and substantive fairness.⁸¹ While there is little doubt that the term “consideration” has been

81. For an influential statement of this position, see ATIYAH, *supra* note **Error! Bookmark not defined.** Atiyah was avowedly influenced by Corbin, whose realism is evidenced throughout his influential writings on consideration. For example, in an important discussion, Corbin urges his contemporaries to quit trying to square the validity of bilateral contracts with the legal-detriment requirement, not because it cannot be done, but rather because the basis of liability lies elsewhere and does not need to clear any bar created by technical rules.

Mutual promises create a legal obligation because—in English-speaking countries, at least—the customary notions of honor and well-being cause men to perform as they have promised, and the lawmaking powers have decreed that in such cases promise-breakers shall make compensation. Our prevailing credit system in business requires such a rule. The basis for the enforcement of bilateral contracts lies in mutual assent and fair dealing.

Corbin, *supra* note 30, at 375-76. Although, in this passage, he urges us to dispense with the legal-detriment requirement, the reasoning applies more generally to any technical bargain requirement. The familiar empirical and normative criticisms of the realist position—namely, that courts rarely invent or ignore consideration in a manner inconsistent with the literal application of the technical bargain requirement, and that the open-ended discretionary power is at odds with the rule of law—are carefully rehearsed by Stephen Smith. See SMITH, *supra* note 9, at 227-32.

stretched beyond the province of bargain (on any conception of the form) to embrace gratuitous promises that judges, rightly or wrongly, have wished to enforce, the proper theoretical (and pedagogic) response to this is to make the exceptional character explicit, and not to leap to a premature conclusion that the exception has swallowed the rule.⁸² Of course, exceptions *can* swallow rules, or indicate an absence of commitment to them, but whether they do is a function not just of the amount of flesh left on the bone after the cuts have been made, but whether the reasons for the exceptions are compatible with the underlying reasons or principles for adopting the rule in the first place. The deepest harmony between a rule and its exception is achieved when the very reasons for adopting the rule also count in favor of recognizing the exception (as when the reasons for the rule do not apply to a class of cases that are accordingly treated exceptionally). When the exceptions are drawn on this basis, they do not threaten the integrity of the rule even when the ground that they cover is quite vast; for this reason, one cannot infer from a willingness to draw exceptions that a rule is not taken seriously. This is precisely the situation with regard to many of the traditional exceptions to the bargain requirement: as we have seen, although the exceptions are substantial, they align perfectly with the functional rationale I have ascribed. Of course, if one is (as Patrick Atiyah and Corbin were) caught in the grip of a conception of the bargain requirement that obscures the underlying rationale—indeed, a conception of the requirement that does not enjoy the benefit of *any* rationale—one may then understandably infer from the breadth of the exceptions that they have been drawn without regard for the (so-called) requirement. But this serves only to underscore the importance of obtaining a tighter grip on our central concepts in law—none more central or significant than bargain, or quid pro quo exchange.

In differentiating my position from the realist one, I risk overstating the significance of the functional rationale for the overall account I have provided. Even if one were to reject, or supplement, the rationale I have given, the account of bargain or exchange would survive. So would the reconceptualization of consideration that incorporates it, and, in so doing, avoids the traditional difficulties related to conditional gift promises and preexisting duties. Indeed, those who are inclined to view the central doctrines of common law as embodiments of noncontingent principles of right (Kantian or otherwise) might view my efforts as a preliminary purification: by purging the doctrine of its Holmesian dross, and exposing its crystalline structure, perhaps consideration is now ripe for a treatment revealing that it, too, is a corollary of an abstract principle of right.

This is not the course I have taken, and I embrace the contingency that is woven into my analysis. According to my account, the bargain performs a function that, while open to challenge, is widely perceived as important: namely, ensuring that the commitments made in personal, intimate contexts are not enforceable absent a manifest intent to be legally bound. Even if we take this goal for granted, the contingency of the rule derives from the fact that there are other ways of achieving it. If the legal system has reasons for choosing this way of achieving the goal rather than some other way (for example, rather than imposing a direct, nonproxy rule requiring, as a condition of liability, a showing of legal intent in social and domestic agreements) these are reasons that

82. This has long been a standard way of analyzing judicial language concerning the validity of the seal. Pollock, for example, explained that although

we are now accustomed to bring contracts under seal within the terms of the condition by saying that where a contract is under seal the consideration is presumed. . . . [T]his is a transparent fiction. . . . The ancient reason why a deed could be sued upon lay not in a consideration in our present sense of the word being presumed from the solemnity of the transaction, but in the solemnity itself.

POLLOCK, *supra* note 16, at 116.

might change over time, ungrounded in the inherent promissory rights of the parties to the agreement. Recognizing this contingency strikes me as an appropriate position to adopt, and not only for the familiar reason that other legal systems with their own distinct ways of achieving similar functions do not seem to be susceptible to a rights-based criticism on those grounds alone.⁸³ More fundamentally, the line separating (unexecuted) exchange agreements from gratuitous promises does not seem to possess the kind of intrinsic significance that could directly justify their differential treatment within contract law. Perhaps I am wrong, and fail to grasp the full potential of the account I have offered. Perhaps the reciprocal-payment relation that I have identified possesses just the kind of significance that could justify the requirement without appeal to other factors. I am open to that possibility, but have not yet seen how the case can be made. In any event, the line between exchange and gratuitous agreements *does* have considerable social significance; indeed, it bears a very close relation—whether indicative or constitutive—to social distinctions that, it is widely believed, the law of contracts has reason to heed. And so I conclude that it is *these* social lines that are the objects of the law’s concerns when it imposes a bargain requirement. The resulting account is, to be sure, a functional one, assigning the doctrine the independently specifiable goal of screening off informal social and domestic agreements. But we must not think that such an explanation in any way denigrates the doctrine.⁸⁴ I would say that to harbor such a thought is to commit the error of treating the common law as though it were divine law; however, even divine law frequently receives a functional justification from even its most devoted adherents.⁸⁵

In closing, I would like to gesture, however inadequately, toward a final respect in which the doctrine serves its function only contingently. A bargain requirement is a sensible way of marking off the distinction between the personal and nonpersonal domains only insofar as the exchange form is widely used in the nonpersonal domain. It is one thing to derive exceptions to a bargain requirement for discrete kinds of nonexchange transactions in the commercial realm (such as surety agreements); it would be quite another to apply a bargain requirement to screen for social contexts if bargains had fallen out of use entirely. Of course, quid pro quo exchange is at no risk of extinction, and this is not to be lamented. However, once the nature of exchange has been exposed—and Reciprocal Debt Satisfaction and No Residue articulated—we can appreciate that the appeal of the form depends on both the desirability and availability of the species of closure that it promises. And it is important to see that background norms and collective decisions can make an impact on each of these things. This is easiest to observe by considering the extreme cases. Where individuals (or groups) take themselves to be without normative constraints in their interactions with strangers, the prospect of leaving unsettled the status quo ante with particular strangers might be a frightening one, and people living in such conditions might generally welcome modes of service that establish lasting ties. At the other extreme, where a strict egalitarianism of resources prevails, and everyone must end up with an even share at the end of the day, many

83. For comparative approaches that emphasize the functional commonalities between the diverse systems, see THE ENFORCEABILITY OF PROMISES IN EUROPEAN CONTRACT LAW (James Gordley ed., 2001); and Arthur T. von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009 (1959).

84. This is especially true when we consider that the goal is not restricted to the satisfaction of preferences, but rather relates to the noninstrumental value of personal relationships.

85. For example, the Babylonian Talmud records the view that the prohibition concerning the consumption of wine produced by non-Jews is to be explained by the rabbinic policy of discouraging intermarriage. See KOREN TALMUD BALVI, NOÉ EDITION: AVODA ZARA & HORAYOT 191 (Tzvi Hersh Weinreb & Joshua Schreier eds., Koren Publishers Jerusalem 2018) (c. 3d-6th centuries C.E.).

exchanges are rendered futile, subject to unwinding at day's end.⁸⁶ Just as Rawls, following Hume, identified “circumstances of justice” in which human cooperation is both possible and desirable (indeed, necessary)—namely, limited altruism, moderate scarcity of resources, and a rough equality in mental and physical capacities⁸⁷—so too are there circumstances of exchange, yet to be identified.

Beyond its role in hastening or preventing the extreme cases, the law may otherwise impact the desirability of exchange by limiting the degree of closure that may be produced by the transactional form. The infamous 1842 decision of *Winterbottom v. Wright*,⁸⁸ as well as the subsequent development of the law of negligence, is a case in point, and a fitting close to this Article. In *Winterbottom*, the injured driver of a defective coach (owned by the driver's employer, the English postmaster) sued the coach's manufacturer, and the Exchequer of Pleas dismissed the suit for lack of “privity” between the driver and the manufacturer. What is interesting, for our purposes, is the analysis of Lord Chief Baron Abinger:

By permitting this action, we should be working this injustice, that after the defendant had done everything to the satisfaction of [the postmaster], *and after all matters between them had been adjusted, and all accounts settled on the footing of their contract*, we should subject them to be ripped open by this action of tort being brought against him.⁸⁹

Chief Baron Abinger grasped that parties to exchange agreements regard each performance as discharging the duties generated by the other, and concluded (questionably) that a finding of liability would be at odds with this understanding.⁹⁰ However, Chief Baron Abinger drew the wrong conclusion about the legal significance of the parties' understandings, and seventy-five years later a tort duty grounded in foreseeability of harm was firmly established by Judge Cardozo in his opinion for the New York Court of Appeals in *MacPherson v. Buick Motor Co.*⁹¹ Judge Cardozo explained the court's rejection of the privity rule as follows:

We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.⁹²

While Judge Cardozo's decision is justly celebrated (and Chief Baron Abinger's rightly maligned), we must also give Chief Baron Abinger his due by recognizing that locating such a duty of care “in the law” *does*, to some extent (however justifiably), interfere with the ability

86. This is related to Robert Nozick's well-known Wilt Chamberlain example. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 160-61 (1974).

87. See HUME, *supra* note **Error! Bookmark not defined.**, at 317-18; JOHN RAWLS, A THEORY OF JUSTICE 109-10 (rev. ed. 1999).

88. *Winterbottom v. Wright* (1842) 152 Eng. Rep. 402; 10 M&W 109.

89. *Id.* at 405, 10 M&W at 115 (Abinger CB) (emphasis added).

90. I say this conclusion is questionable, given that the plaintiff was a third-party stranger to the exchange. On my account, each party to an exchange regards their performance as discharging all duties owed *to the other party* on account of *the other party's performance*, and this understanding is not strictly incompatible with a duty owed to a third party on account of one's own performance.

91. 111 N.E. 1050 (N.Y. 1916).

92. *Id.* at 1053.

of exchange to facilitate the redistribution of goods and services in such a way that leaves the parties' rights and duties in all other respects undisturbed. Corresponding with the law's recognition of the responsibilities owed towards the strangers with whom we interact is a diminishment in the appeal of a particular transactional form—the exchange agreement—that allows us to remain at arm's length in those interactions.