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Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration

MARK B. WESSMAN*

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I. INTRODUCTION

The doctrine of consideration is decidedly out of fashion these days. Undoubtedly, the fact that a promise is supported by traditional consideration usually provides a *sufficient* reason to enforce it.¹ To the

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1. JOHN P. DAWSON, GIFTS AND PROMISES 220-21 (1980). Dawson argued that an appropriately limited doctrine of consideration expressed

an idea that has been accepted for centuries in Anglo-American law: that a sufficient reason for enforcing a promise is that it is part of an agreed exchange which would enable each party to secure from the other an act or result that he

extent that the doctrine of consideration is identified with the proposition that bargains should generally be enforced, the doctrine is very much alive. The classical contract theorists, however, included a second proposition within the "doctrine of consideration." They asserted that consideration was a *necessary* condition for the enforcement of a promise; they thus assigned to the doctrine of consideration a gatekeeping function.² The doctrine of consideration sorted promises into two classes, bargain promises and gratuitous promises. The former were admitted to the realm of contract, and the latter were consigned to outer darkness. It is this gatekeeping function of the doctrine of consideration that is now so out of fashion among academics. It is also the subject of this Article, and I shall henceforth use the phrase "doctrine of consideration" to refer to the view that *only* promises supported by consideration should be enforced.

The current attack on the doctrine of consideration has been building for some time. A little less than twenty years ago, Gilmore advanced the thesis that contract, and "the balance wheel of the great machine,"³ the doctrine of consideration, were in the process of reabsorption into tort. Gilmore attributed this process to the rise of promissory estoppel.⁴ While subsequent scholarship on promissory estoppel has provided good reason to doubt Gilmore's view that contract as a whole is being eaten up by tort,⁵ it has nonetheless confirmed the importance and frequency of reliance-based recovery as an alternative to recovery based on bargain.⁶ It is difficult to avoid the impression that any promises stopped at the gate of consideration are likely to gain

sought. There are other exceptional reasons for enforcing promises, but this is overwhelmingly the normal one.

Id. While the presence of consideration "usually" justifies enforcement of a promise, there are thoroughly uncontroversial exceptions to the general rule that bargains are enforced. For example, bargains subject to defenses of fraud, duress, incapacity, undue influence, mistake, illegality, or unconscionability may very well qualify as bargains, but various policy or moral reasons militate against their enforcement. In addition, there are some bargains that are too casual or trivial to justify enforcement. *See infra* notes 98-101 and accompanying text. Appropriately qualified, however, Dawson's generalization is difficult to dispute.

2. *See* GRANT GILMORE, *THE DEATH OF CONTRACT* 18-34 (1974) (describing the classical theory of consideration).

3. *Id.* at 18.

4. *Id.* at 87.

5. *See generally* Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 *YALE L.J.* 111 (1991) (arguing that courts tend to enforce, with expectancy damages where possible, promises deliberately made, using the presence of reliance as an indication of deliberation).

6. *See generally* Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 *HOFSTRA L. REV.* 443 (1987); Mary E. Becker, *Promissory Estoppel Damages*, 16 *HOFSTRA L. REV.* 131 (1987); Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 *U. CHI. L. REV.* 903 (1985); Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 *YALE L.J.* 343 (1969); Yorio & Thel, *supra* note 5.

entrance through the back door of promissory estoppel.⁷

While it is clear Gilmore had no plans to mourn the death of the "requirement" of consideration (or the classical theory of which it was a part), he was apparently content to illustrate the waning of the requirement.⁸ Other scholars have attacked the doctrine of consideration more directly and enthusiastically. Professor Fried has assailed the so-called "requirement" of consideration as internally incoherent and inconsistent with the moral foundation of the enforcement of promises.⁹ Economic theorists have suggested that gains in utility could be produced by recognizing a class of enforceable gratuitous promises.¹⁰ Indeed, it has been suggested that much of the good work accomplished by the doctrine of consideration could be done by other doctrines¹¹ and that the use of the doctrine of consideration by judges is generally superfluous or pretextual.¹²

One of the difficulties with the recent frontal assaults on the doctrine of consideration, however, is that they tend to be relatively abstract. They pay insufficient attention to the various maneuvers judges actually perform with the aid of the doctrine of consideration. Given the volume and clear trend of the scholarly criticism, one would expect that, in the years since Gilmore's book was published, cases in which promises are held unenforceable for lack of consideration would have virtually disappeared from the reports. It might not be surprising to find the ritual incantation that consideration is a "requirement" or "element" of a valid contract. Retention of the "requirement" of consideration as a mere rhetorical salute to the past would be an example of the survival of a common law rule as a verbal formula after its substantive bite was lost. If the critics of the doctrine of consideration are correct, however, decisions in which the doctrine of consideration functions as a gatekeeper should be extremely rare products of backwater courts in which the gospel according to Gilmore has not been heard or heeded.

If the old gatekeeper has been fired, however, someone forgot to

7. See Farber & Matheson, *supra* note 6, at 930 (suggesting that any promise made in furtherance of an economic activity is, as a practical matter, enforceable). See generally James D. Gordon III, *Consideration and the Commercial-Gift Dichotomy*, 44 VAND. L. REV. 283 (1991) (suggesting that all promises that are commercial or relate to exchange should be enforceable) [hereinafter Gordon, *Consideration*]; James D. Gordon III, *A Dialogue About the Doctrine of Consideration*, 75 CORNELL L. REV. 987 (1990) [hereinafter Gordon, *Dialogue*].

8. See GILMORE, *supra* note 2, at 55-85.

9. CHARLES FRIED, *CONTRACT AS PROMISE* 28-39 (1981).

10. See Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39 (1992); Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411 (1977).

11. See E. ALLAN FARNSWORTH, *CONTRACTS* § 4.22, at 294-95 (2d ed. 1990) (referring specifically to the preexisting duty rule); Gordon, *Consideration*, *supra* note 7; Gordon, *Dialogue*, *supra* note 7; Malcolm P. Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783, 796-97 (1941).

12. See Kull, *supra* note 10, at 40-46.

tell large numbers of judges. Often, the requirement of consideration is still expressly used as a gatekeeper. Since the mid-1970s, there have been more than 300 reported cases in which the enforcement of a promise has been denied or placed in serious peril on the ground of lack of consideration.¹³ The doctrine of consideration thus presents a somewhat puzzling divergence of theory and doctrinal development. No academic today would seriously assert a descriptive claim that consideration is a necessary condition for the enforcement of a promise. Nevertheless, judges talk and act as if it were. They decline to enforce promises, citing the absence of consideration as a reason. Cases that theoretically should occur rarely, if at all, are found with a frequency that would, I believe, surprise most contracts teachers and scholars.¹⁴ Accordingly, a critical examination of those cases is necessary to determine whether the judges are simply misguided or whether the doctrine of consideration does useful work that our theories have overlooked.

If the critics of the doctrine of consideration are correct, an analysis of the cases in which a promise is held unenforceable due to lack of consideration (or in which that possibility is left open on remand) should yield troublesome results. At the very least, one would expect to find cases of the following kinds: (a) cases in which the application of the doctrine of consideration was superfluous, in the sense that it yielded a desirable result that could have been reached just as easily on other grounds; (b) cases in which the doctrine of consideration was used as a pretext to reach a result desired for entirely different, and perhaps unstated or disreputable, reasons; and (c) cases in which the application of the doctrine of consideration resulted in an undesirable disposition. One would expect to find a doctrine that, in operation, is alternately

13. I am interested in a class of cases that includes both cases in which a court makes a final determination that a particular promise lacks consideration and cases in which an appellate court finds the issue of consideration inappropriate for summary disposition. In the latter cases, the appellate court remands the case to a lower court, leaving open the possibility that the lower court may find an absence of consideration. The entire class of cases forms, in effect, a database for this article. (A list of the cases used as a database is on file with the author and is available on request). I shall not discuss, except occasionally for illustrative purposes, the numerous cases in which courts recite the necessity of consideration and go on to find the requirements of the doctrine satisfied.

14. Some might object that the number of cases in which the doctrine of consideration is used as a gatekeeper (roughly twenty a year) does not seem inordinately large in absolute terms. There are three responses. First, the number in question is only the number of reported cases. As in the case of other doctrines, one may assume that not all such applications of the doctrine of consideration find their way into the reports. Second, because most business contracts are, in fact, bargains, the issue of consideration will not arise in most contract cases. It is thus surprising to find so many cases in which the issue of consideration is raised, let alone decided negatively. Finally, the current literature on the subject of consideration leads one to predict that such cases will almost never occur.

superfluous, deceptive, or harmful and that could be eliminated without serious doctrinal dislocation.

This Article analyzes a significant cross-section¹⁵ of the cases decided in roughly the last seventeen years¹⁶ in which the doctrine of consideration has performed its negative gatekeeping function. My goal is to ascertain whether those cases support or refute the thesis that the doctrine can, in principle, be eliminated.

If such an analysis is not to be utterly disjointed, some way of organizing the cases into manageable groups is necessary. It is customary to think of the doctrine of consideration as a general principle and a group of corollaries.¹⁷ The general principle is a requirement that a promise be part of an exchange of values and that each side of the exchange induce the other.¹⁸ The corollaries, such as the preexisting duty rule, the doctrine of illusory promises, and the full revocability of offers, purport to be¹⁹ subsidiary rules that result from the application of the general principle to specific recurring transaction patterns. In this Article, I shall examine four of the purported corollaries to the doctrine of consideration: the rule that illusory promises cannot be consideration,²⁰ the requirement of mutuality of obligation,²¹ and the rules that past consideration²² and moral consideration are not sufficient to support

15. Given the number of cases in which consideration is used as a gatekeeper, a discussion of all of them would produce an article of unmanageable length. I believe that the set of cases chosen for discussion in this article should yield generalizations that can be extended to the remainder of the cases for reasons set out *infra* notes 28-29 and accompanying text.

16. I chose the cut-off date of 1976 because of my belief that much of the current scholarly interest in and criticism of the doctrine of consideration is an outgrowth of Grant Gilmore's book, *The Death of Contract*, which appeared in 1974. The influence of the critics (if any) would, accordingly, appear after that date.

17. See B.J. Reiter, *Courts, Consideration, and Common Sense*, 27 U. TORONTO L.J. 439, 441 (1977).

18. See FARNSWORTH, *supra* note 11, at 43-68; GILMORE, *supra* note 2, at 18-34; OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 292-95 (1881) (considered the most famous statement of the requirement of mutual inducement).

19. I use the phrase "purport to be" because I do not wish to prejudge the question whether the subsidiary rules customarily associated with the general requirement of bargained-for exchange are true corollaries in the strict logical sense. Professor Farnsworth, for example, has argued that the preexisting duty rule is not a logical entailment of the general requirement of consideration. See FARNSWORTH, *supra* note 11, at 287; see also Reiter, *supra* note 17, at 456-58, 471, 507.

20. An "illusory promise" may be defined as a purported promise that gives the promisor the option to perform or not. Illusory promises may take a form substantially equivalent to "I promise to do X, if I so desire," or they may be apparently substantive promises accompanied by an unlimited termination right. See RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a (1979).

21. The requirement of mutuality of obligation may be formulated as the principle that both parties to a contract must be bound or neither is bound. Cf. *infra* notes 380-82 and accompanying text (discussing various exceptions to this formulation).

22. The supposed "rule" that past consideration is no consideration is now subject to a host of

a contract.²³

The four corollaries chosen as the subject of this Article are appropriate vehicles for analysis for several reasons. First, Karl Llewellyn once suggested that the various rules grouped under the topic of "consideration" form no discernible factual or doctrinal unity.²⁴ Rather, they reflect the pressure of a number of different (and possibly inconsistent) policies in different recurring situations.²⁵ If he is correct, the corollaries are actually more fundamental than the general requirement of bargained exchange and should be examined first.

Second, there is good reason to pair the illusory promise cases with the mutuality of obligation cases and to pair the past consideration cases with the moral consideration cases. The illusory promise cases are just a subset of the mutuality of obligation cases,²⁶ and the past consideration and moral consideration cases largely overlap.²⁷ The four corollaries thus cover two interlocking or overlapping bodies of cases. Therefore, each pair of corollaries seems likely to present related problems for analysis.

Third, each pair of corollaries discussed in this Article illustrates one of the most common ways in which a purported contract can fail for lack of consideration. The consideration "requirement" has two aspects: exchange and mutual inducement. The mutuality of obligation cases

exceptions. See *infra* notes 383-86 and accompanying text (discussing exceptions to the "rule" that past consideration is no consideration).

23. The term "moral consideration" is ambiguous. Sometimes it refers to one of the exceptions to the principle of mutuality of obligation—specifically, the exception that permits a voidable duty or promise to serve as consideration for a return promise. See RESTATEMENT (SECOND) OF CONTRACTS § 78 (1979). Occasionally, it refers to a set of rules making subsequent promises to pay debts barred by the statute of limitations or discharged in bankruptcy or subsequent promises to perform obligations subject to the defenses of fraud, mistake, incapacity, duress, or undue influence enforceable. See RESTATEMENT (SECOND) OF CONTRACTS §§ 82, 83, 85 (1979). In either of these senses, moral consideration qualifies as (or substitutes for) consideration, and neither of these senses is relevant to this Article. The relevant use of the term "moral consideration" occurs in those cases in which a promise is held unenforceable because it is supported by "mere moral consideration" and is usually equivalent to "mere love and affection," "mere gratitude," or "mere moral obligation." The cases denying enforcement to a promise because it is supported only by moral consideration are few in number, and a substantial number of the cases in which the issue of "moral consideration" is raised are also cases in which the issue of past consideration is raised. See *Tcherpnin v. Franz*, 457 F. Supp. 832 (N.D. Ill. 1978); *Worner Agency, Inc. v. Doyle*, 479 N.E.2d 468 (Ill. App. Ct. 1985); *Schoenfeld v. Ochsenhaut*, 452 N.Y.S.2d 173 (N.Y. Civ. Ct. 1982); *Production Credit Ass'n of Mandan v. Rub*, 475 N.W.2d 532 (N.D. 1991); *Dementas v. Estate of Tallas*, 764 P.2d 628 (Utah Ct. App. 1988).

24. See Karl N. Llewellyn, *On the Complexity of Consideration: A Foreword*, 41 COLUM. L. REV. 777 (1941).

25. *Id.*

26. If the "promise" of one party to a purported contract is illusory, his performance is optional and he is not "bound." Under the principle of mutuality, neither is the other party.

27. See *supra* note 23.

(including the subset of illusory promise cases) involve situations in which there is arguably no genuine exchange because one of the parties is not "bound." In the past consideration cases (and the overlapping moral consideration cases), on the other hand, the critical defect is an absence of mutual inducement.²⁸ The four corollaries discussed in this Article thus represent both of the most common ways in which it is possible to run afoul of the doctrine of consideration. For that reason, it is my hope that the conclusions drawn with respect to the corollaries analyzed in this Article will be applicable to the rest of the cases in which consideration doctrine functions as a gatekeeper.²⁹

Finally, some of the other corollaries to the doctrine of consideration have already been the subject of sustained, cogent criticism by others.³⁰ The four corollaries discussed in this Article seem more in need of fresh examination and appear more likely to reveal whatever merit the doctrine of consideration still might have.

Ultimately, however, the analysis of the cases applying the four corollaries provides strong support for the views of the critics of the doctrine of consideration. Part II of this Article explores the considerable number of cases in which the corollaries to the doctrine of consideration produce case dispositions that are (or could be) produced by applications of traditional doctrines of assent. The results in such cases are generally desirable, but the use of consideration doctrine is entirely redundant. Moreover, the doctrines of assent that produce the same results are more fundamental to contract law and theory than the doctrine of consideration. Indeed, assent doctrines also do a better job of screening out a class of promises which scholars generally agree should not be enforced.

Part III contains an analysis of a range of cases in which courts

28. The corollary that "past consideration is no consideration" follows fairly directly from the requirement of mutual inducement imposed by the classical theory of consideration. To say that a promise and its consideration must be "bargained for" normally implies that the promise and its consideration "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." RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b; *see also* GILMORE, *supra* note 2, at 18-34. If the purported consideration for a promise is some performance rendered in the past, however, the requisite reciprocity of inducement is absent. The subsequent promise cannot "induce" or be the "motive" for what has already happened or been done.

29. It is my hope to explore other corollaries to the doctrine of consideration in a subsequent article.

30. *See, e.g.*, FARNSWORTH, *supra* note 11, §§ 4.21-4.22 (criticizing the preexisting duty rule); K.C.T. SUTTON, CONSIDERATION RECONSIDERED 191-264 (1974) (summarizing criticism of revocability of offers, preexisting duty rule, and claim settlement rules); Karl N. Llewellyn, *What Price Contract? An Essay in Perspective*, 40 YALE L.J. 704, 742-43 (1931) (criticizing modification rules and failure to recognize firm offers); Reiter, *supra* note 17 (criticizing the preexisting duty rule).

appear to be using the doctrine of consideration as a policing device. In one set of cases, the corollaries to the doctrine of consideration (particularly the rules on past and moral consideration) are used to invalidate promises in circumstances that suggest defenses based on misconduct, such as fraud, duress, or undue influence. In some instances, the misconduct-based defense is clearly established, and the doctrine of consideration is once again merely superfluous. In some instances, however, the doctrine of consideration seems to be used as a substitute for such defenses. This use produces some adverse effects, including the systematic denial of enforcement to one class of promises (post-loan guaranties) that, in my view, should be enforced. Part III also includes an analysis of cases in which the corollaries to the doctrine of consideration are used as methods of policing agreements for fairness—a use to which they are ill-adapted. Part III concludes with a discussion of a set of cases in which the corollaries appear to be used to make covert policy choices, often at the expense of a more rational policy analysis.

Part IV contains an analysis of cases in which applications of the four corollaries to the doctrine of consideration do further harm, including blocking the enforcement of classes of promises that, in my view, should be enforced. I conclude that, on balance, the disadvantages of the four corollaries outweigh any advantages. The benefits of the corollaries can be produced by other traditional contract doctrines, and their adverse effects confirm the views of the critics who advocate their abandonment.

II. CONSIDERATION AS AN ALTERNATIVE TO, OR SUBSTITUTE FOR, APPLICATION OF DOCTRINES OF ASSENT

The frequency with which the doctrine of consideration serves as merely one ground of decision among many that were (or could have been) used is striking. Equally striking is the frequency with which the actual or potential alternative ground of decision is one of the rules traditionally regarded as aspects of the requirement of mutual assent.³¹ In such cases, the use of the doctrine of consideration is superfluous in the sense that whatever work it does can be done as well by one of the assent doctrines. Because the assent doctrines are more fundamental,³² the doctrine of consideration is the logical candidate for elimination. However, assent can fail in a variety of ways, and the ways in which

31. In classifying the various rules concerning offer, acceptance, definiteness, and objective manifestation of assent as aspects of the requirement of mutual assent, I am following the organizational principle of the RESTATEMENT (SECOND) OF CONTRACTS (1979), which collects a variety of such rules in Chapter 3 under the general heading, "Formation of Contracts—Mutual Assent." See RESTATEMENT (SECOND) OF CONTRACTS §§ 17-70 (1979).

32. See *infra* part II.E.

consideration doctrine can serve as a backup for assent doctrine vary accordingly. I shall illustrate these variations before assessing the implications of the redundancy of consideration doctrine.

A. Complete Failure of Agreement

In some of the cases involving applications of one of the corollaries to the doctrine of consideration, one is driven to the conclusion that the parties had no agreement at all. The requirement of mutuality of obligation was invoked in such a situation in *Gulf Chemical Employees Federal Credit Union v. Williams*.³³ The plaintiff lender (Gulf) made a loan to an individual (Payne) for the purpose of purchasing a car from the defendant seller (Williams).³⁴ The check representing the loan was jointly payable to Payne and Williams. A notice on the back of the check included the warning: "You are obligated to furnish a negotiable title to the vehicle . . . within thirty days after endorsement of this check."³⁵ Although Payne apparently obtained a document of title, the lender never received it.³⁶ As a result, the lender was unable to perfect a security interest in the car.³⁷ When Payne defaulted on the loan and disposed of the car, the lender sued both Payne and Williams on the theory that both were contractually obligated to deliver title to the vehicle.³⁸

The trial court entered summary judgment for Williams, and the appellate court affirmed.³⁹ The primary ground for the appellate court's decision was that no "mutual intent" or "distinct understanding common to both parties" had been demonstrated.⁴⁰ Williams and the lender had no communications other than the check itself, and the language of the check did not identify unambiguously who was to deliver title or to whom it was to be delivered.⁴¹ As there had been no meeting of the minds, there was no agreement to enforce.⁴² The court added that the lender had neither promised anything to Williams nor done anything specifically for him. It had merely disbursed funds pursuant to an existing agreement with Payne.⁴³ Accordingly, the alleged agreement

33. 693 P.2d 1092 (Idaho Ct. App. 1984).

34. *Id.* at 1094.

35. *Id.*

36. *Id.* at 1094-95.

37. *Id.* at 1094.

38. *Id.*

39. *Id.*

40. *Id.* at 1095.

41. *Id.* On the same factual basis, of course, the court could have held that the agreement asserted was too indefinite to be enforced.

42. *Id.*

43. *Id.* at 1096.

with Williams also failed for lack of mutuality of obligation.⁴⁴ The application of consideration doctrine may have been correct by classical standards, but it was obviously secondary and utterly superfluous.⁴⁵

In other cases, the "past consideration" corollary to the doctrine of consideration has been applied where the failure of assent was so complete that the parties literally had no agreement. The best example is probably *Rohrscheib v. Helena Hospital Ass'n*.⁴⁶ A woman was admitted to the plaintiff hospital for treatment. Although she was apparently unaccompanied at the time of admission, her brother-in-law, the defendant Rohrscheib, visited her five days later.⁴⁷ Rohrscheib became concerned about her condition and arranged for her transfer to a hospital in Memphis.⁴⁸ When his sister-in-law was released, Rohrscheib signed the admission form that had been typed by a hospital employee when the sister-in-law was admitted.⁴⁹ The form contained information about the patient but none about hospital charges or rates.⁵⁰ While the phrase "Financial Statement" appeared above the signature line and the phrase "responsible party" appeared below it, the form contained no language expressly imposing an obligation upon anyone to pay for services or room occupancy.⁵¹ Rohrscheib thought that by signing the form he was merely assuming responsibility for any injury to his sister-in-law that might occur after her release.⁵² The hospital, however, contended that, by signing the form as the "responsible party," Rohrscheib had guaranteed payment of his sister-in-law's hospital bill, which was in excess of \$4000.⁵³

The hospital prevailed at the trial court level, but the court of appeals reversed.⁵⁴ It examined the admission form and found no evi-

44. *Id.* at 1095-96.

45. For additional cases applying the requirement of mutuality under circumstances indicating a complete absence of assent by one of the parties, see *Parmenter v. Federal Deposit Ins. Corp.*, 925 F.2d 1088 (8th Cir. 1991) (alleged promises of payment to lessors of agricultural land by FDIC made by one who was not agent of FDIC); *Meineke Discount Muffler Shops v. Feldman*, 480 F. Supp. 1307 (S.D. Tex. 1979) (alleged assignment executed only by purported assignees); *Historic Hermann, Inc. v. Thuli* 790 S.W.2d 931 (Mo. Ct. App. 1990) (person who executed real estate contract was not agent of plaintiff, and plaintiff took no other action making it a party to the contract).

46. 670 S.W.2d 812 (Ark. Ct. App. 1984).

47. *Id.* at 813-14.

48. *Id.* at 814.

49. *Id.* at 813-14.

50. *Id.*

51. *Id.* at 814.

52. *Id.*

53. *Id.*

54. The hospital's victory in the lower court was based largely on the strength of parol evidence that "at some point" Rohrscheib had been informed that he was assuming responsibility for hospital charges, even though the charges had not been computed at that time. *Id.* The court

dence of any promise by Rohrscheib to pay anything and no evidence to indicate what "responsibilities" a "responsible party" might be assuming.⁵⁵ The court added that a promise, unsupported by new consideration, to pay the preexisting debt of another "relates to a past consideration" and is unenforceable.⁵⁶ As Rohrscheib did not sign the form until after the charges had been incurred, the hospital's claim ran afoul of the rule on past consideration.⁵⁷ However, the discussion of consideration was entirely superfluous and subordinate to the court's conclusion that there was simply no evidence that Rohrscheib had agreed to pay. Further examples of such complete failure of agreement are found in other past consideration cases,⁵⁸ as well as in cases applying the rule concerning illusory promises.⁵⁹

B. *Failure to Reach the Final Stages of Assent*

Not all cases in which a corollary to the doctrine of consideration serves as a backup theory for the requirement of assent involve such complete failures of agreement. Courts sometimes apply the doctrine of

of appeals held this parol evidence inadmissible under the Arkansas Statute of Frauds, which contains the usual provision requiring promises to answer for the debt of another to be in writing. *Id.*

55. *Id.*

56. *Id.* at 815 (citations omitted).

57. *Id.*

58. There are two additional cases that involve an application of the doctrine of past consideration and in which the failure of assent was so complete as to amount to a complete failure of agreement. *See Weber by Sanft v. Goetzke*, 371 N.W.2d 611 (Minn. Ct. App. 1985) (finding alleged joint enterprise among members of extended family to clean up, sell, and divide proceeds from lakefront recreational property not to be contractual); *Remington v. Wren*, 564 P.2d 1025 (Ore. 1977) (unsuccessful attempt by contractor to impose "account stated" for more than original contract amount). *See also Deeter v. Dull Corp.*, 617 A.2d 336 (Pa. Super. 1992) (refusing to find suretyship contract on the basis of mere "moral obligation"; evidence of promise or assent by alleged surety entirely lacking).

59. *See, e.g., Serpe v. Williams*, 776 F. Supp. 1287 (N.D. Ill. 1991). The dispositive issue in *Serpe* was whether the wives of four life insurance salesmen established a contractual relationship with the husbands' employer simply because the husbands' employment agreements contained signature lines for the wives. The court first did precisely what the objective theory of assent would require it to do without referring to assent at all. The court examined the contract and related materials and noted the paucity of references to the spouses and the absolute absence of any commitment by any spouse to do anything whatsoever. Further, the court noted the contrasting detailed elaboration of the duties of the husbands. The court concluded that no one intended the wives to be parties to the agreement. The signature line for a spouse on each contract was insufficient, by itself, to manifest the requisite intent.

The court could have ended its opinion at that point, concluding that any reasonable person would consider each spouse's signature a mere gesture of solidarity rather than a manifestation of contractual assent. Instead, however, the court found that any promise on the part of the wives was the illusory promise to "support their husbands only if they want to," which was insufficient to satisfy the requirement of mutuality. In traditional doctrinal terms, the discussion of consideration is flawless, but the whole discussion came after the conclusion that the wives had not really agreed to do anything or become parties and was, therefore, entirely superfluous.

consideration in cases in which they also find that the parties to an alleged contract are engaged in mere preliminary negotiations or have reached partial agreement but fallen short of a *final* manifestation of assent. One of the illusory promise cases, *Garber v. Harris Trust & Savings Bank*,⁶⁰ provides an example. The case was a class action brought by credit card holders against a group of credit card issuers.⁶¹ Each of the issuers had announced changes in the terms upon which it would extend credit, including the addition of annual fees, increases in minimum monthly payments, and changes in the method of finance charge computation.⁶² The cardholders contended that such changes constituted unilateral attempts to modify an existing contract and, therefore, amounted to breaches of contract.⁶³ The premise of the cardholders was that the application for a credit card is an offer that is accepted when the card issuer issues a credit card to the applicant.⁶⁴ The essential terms of the contract are outlined in the cardholder agreement in effect at that time.⁶⁵ The cardholders argued that attempts at unilateral modification are ineffective because they violate the preexisting duty rule, in that they are attempts to secure greater compensation for performing an existing contractual obligation.⁶⁶

The court rejected the cardholders' contentions and dismissed the plaintiffs' claims on a variety of grounds.⁶⁷ One argument accepted by the court was that there can be no contract upon the *issuance* of a credit card because there is no obligation imposed upon the cardholder.⁶⁸ The cardholder incurs no liability unless she uses the card, and she is under no obligation to use it.⁶⁹ Given the illusory⁷⁰ nature of the cardholder's commitment at that point, the agreement lacks mutuality of obligation

60. 432 N.E.2d 1309 (Ill. App. Ct. 1982).

61. *Id.* at 1310.

62. *Id.* at 1310-11.

63. *Id.* at 1310.

64. *Id.* at 1311.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1313.

69. *Id.*

70. The court in *Garber* did not actually use the term "illusory promise." It rested its decision on the requirement of "mutuality of obligation." *Id.* The principle of mutuality of obligation includes not only the instances in which the notion of an illusory promise is used as a corollary to the doctrine of consideration but also other types of cases as well. However, the *Garber* court's analysis is functionally equivalent to that of the New Jersey Superior Court in an earlier case. *Novack v. Cities Serv. Oil Co.*, 374 A.2d 89 (N.J. Super. Ct. Law Div. 1977). The *Novack* court likewise concluded that a credit card agreement was unenforceable because the cardholder was free to cancel it or not to use it. *Id.* at 92. The *Novack* court, however, specifically classified the supposed contractual relationship as illusory. *Id.*

and is unenforceable.⁷¹ In the absence of consideration, the issuer may change the terms upon which it is willing to extend credit.

For purposes of this Article, the most interesting aspect of the *Garber* court's discussion of consideration is that it is superfluous. It was only one of several grounds for the court's decision, and one of the alternate grounds was a plausible manipulation of doctrines of assent. Specifically, the court followed earlier decisions classifying the issuance of a credit card as a standing offer, not as an acceptance concluding a contract.⁷² Acceptance of the issuer's offer occurs when a cardholder uses the card to buy something, and each charge forms a discrete contract.⁷³ The application for the card, which the plaintiffs had asserted to be an offer, was thus relegated to the status of part of the preliminary negotiations—at most an invitation to make an offer.

Garber thus seems to be a case in which the illusory promise corollary to the doctrine of consideration is unnecessary because assent doctrines can do the same work.⁷⁴ There are similar examples among the mutuality of obligation cases⁷⁵ and the moral consideration cases.⁷⁶ One

71. *Garber*, 432 N.E.2d at 1313.

72. *Id.* at 1312.

73. *Id.* at 1311-12.

74. *See also* *Dorman v. Cohen*, 413 N.Y.S.2d 377 (N.Y. App. Div. 1979) (holding agreement unenforceable on alternate theories of lack of mutuality due to illusory promise and simple failure to agree).

75. *See, e.g.,* *Mayer v. King Cola Mid-America, Inc.*, 660 S.W.2d 746 (Mo. Ct. App. 1983) (finding an alleged three-year employment contract unenforceable on a variety of grounds, including: (1) fact that plaintiff did not have a promise "in the contractual sense," but only an expectation of a promise; (2) failure to reach final agreement on essential terms, including commission; and (3) plaintiff's ability to abandon the employment relationship without liability); *see also* *Crellin Technologies, Inc. v. Equipmentlease Corp.*, 18 F.3d 1 (1st Cir. 1994) (alleged contract fails for lack of mutuality and because both parties regarded agreement as tentative unless further contingencies occurred); *Balter v. Pan American Bank of Hialeah*, 383 So. 2d 256 (Fla. 3d DCA 1980) (held alleged loan agreement, in which exact amount of principal, interest rate, time and method of repayment, and documentation were still in process of negotiation, unenforceable as merely preliminary negotiations that were lacking in mutuality); *Serpa v. Darling*, 810 P.2d 778 (Nev. 1991) (real estate options unenforceable because lacking in mutuality and because parties never finally agreed upon the essential terms); *Holley v. Coggin Pontiac, Inc.*, 259 S.E.2d 1 (N.C. Ct. App. 1979) (alleged accord and satisfaction fails for lack of sufficient evidence of intent as well as for lack of mutuality).

76. *See, e.g.,* *Miller v. Miller*, 664 P.2d 39 (Wyo. 1983) (a "moral consideration" case in which nearly any of the known assent doctrines could have served as an alternate ground of decision). The case involved a tangled and largely undocumented series of dealings between a mother and a son between 1966 and the mother's death in 1978. The trail of loans, notes, refinancings, purchase agreements, payments, and proceeds became so complicated that neither the court nor counsel could ascertain what mother and son had intended. The mother's executors contended that the son was liable on one of the notes at issue because he had promised to pay it "if and when he could." The court concluded that the son was not liable because the only consideration was mere moral obligation. The court also suggested failure of assent, concluding that the transactions between mother and son were "casual and informal, based mostly on mutual trust rather than contract." The court also could have found that the alleged commitment to pay

qualification should be added, however. Although not essential in order to reach the correct result, the *Garber* court's discussion of illusory promises is useful in one respect. Specifically, the fact that at a particular stage one party is not committed to anything may strengthen the court's conclusion that the final stage of assent (acceptance) has not been reached. In the business context, one expects transactions to be exchanges, and the absence of consideration at a particular phase of a deal may provide evidence that the deal is not closed. Therefore, even if it proves appropriate to strip from the doctrine of illusory promises the gatekeeping function associated with the doctrine of consideration, it may still be desirable to permit courts to assign it an evidentiary role subservient to doctrines of assent. In cases like *Garber*, a court should be able to consider whether a promise is illusory in determining whether an agreement has reached the final stages of assent.⁷⁷

C. Indefiniteness

A related doctrine of assent, the requirement of certainty or definiteness, is also capable of shouldering some of the load carried by corollaries to the doctrine of consideration. The requirement of definiteness is the principle that the parties to a contract must have reached an agreement sufficiently extensive and specific for a court to ascertain when a breach has occurred and to fashion an appropriate remedy.⁷⁸ An example of the principle's overlap with consideration doctrine is provided by an illusory promise case, *M.J.S. Resources, Inc. v. Circle G Coal Co.*⁷⁹ The plaintiff was the general partner in a limited partnership, St. James Associates.⁸⁰ St. James subleased a coal field and entered into an agree-

the note did not qualify as a promise under the objective theory of assent or that it was fatally indefinite.

77. For an attribution of an evidentiary function (as well as cautionary and channeling functions) to the doctrine of consideration, see Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941). The notion of an illusory promise is also often used in ways subservient to contract doctrines other than assent—in particular as a vehicle for contract interpretation. See, e.g., *Torncello v. United States*, 681 F.2d 756 (Cl. Ct. 1982) (contract construed so as to avoid making promise of one party illusory); *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So. 2d 4 (Fla. 1984) (sovereign immunity waived because contrary result would render contract illusory); *Peeters v. Chicago Dist. Council of Carpenters Welfare Fund*, 423 N.E.2d 485 (Ill. App. Ct. 1981) (illusory nature of adoptive father's pre-birth "contract" with natural mother used to deny adopted child status of "dependent" at birth for purposes of insurance coverage); *Martin v. Prier Brass Mfg.*, 710 S.W.2d 466 (Mo. Ct. App. 1986) (insurance contract construed to avoid making commitment of employer illusory); *Newman v. Sablosky*, 407 A.2d 448 (Pa. Super. Ct. 1979) (financing contingency in real estate contract not construed as grant of absolute right to refuse to purchase; to do so would make agreement lack "mutuality of promises").

78. See U.C.C. § 2-204 (West 1989); RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1979).

79. 506 F. Supp. 341 (E.D. Mo. 1980).

80. *Id.* at 343. The sole purpose of St. James was to provide a tax shelter for high-income

ment with Circle G for the actual mining of the coal.⁸¹ The agreement provided for payments to Circle G for each ton of coal mined. It also specifically provided that St. James would not be obligated to pay for coal until it had been sold and unless St. James had specifically requested that the coal be mined.⁸² Unfortunately, the agreement was silent concerning which party was obligated to arrange for the sale of the coal.⁸³ When it became clear that Circle G could not perform, plaintiff brought suit.⁸⁴

The court found the mining agreement unenforceable on grounds of lack of consideration, specifically lack of mutuality of obligation.⁸⁵ Mutuality of obligation was lacking because performance depended upon the "will, wish or pleasure of one of the parties," which made St. James' promise to pay illusory.⁸⁶ St. James was only required to pay if someone pre-sold the coal and St. James requested mining services.⁸⁷ Under the terms of the written agreement, however, St. James was under no obligation either to sell or to make the request.⁸⁸ Accordingly, St. James could not enforce the return promise to perform mining services.⁸⁹

However, the discussion of mutuality of obligation and illusory promises in *M.J.S.* is redundant. St. James's promise was illusory because the parties had failed to agree on an essential term. Each party thought that the other party was obligated to arrange for the marketing of the coal.⁹⁰ If coal must be pre-sold to be mined, a mining agreement that does not specify who is to do the selling is fatally indefinite.⁹¹ If

individuals by exploiting the favorable tax treatment the Internal Revenue Service accorded advance coal royalties at the time. *Id.* at 342.

81. *Id.* at 343.

82. *Id.* at 344. The reason for the twin requirements of prior sale and prior request was that coal in the region in question cannot be stored outdoors prior to sale. Apparently, exposure to rain and organic matter causes a chemical reaction which, in turn, ignites the coal. *Id.* at 345.

83. *Id.* at 342-43.

84. *Id.* at 346. Circle G experienced financial difficulties and sold its assets, thereby disabling itself from performing. *Id.* at 345-46.

85. *Id.* at 342, 347.

86. *Id.* at 347. The court's opinion does not use the word "illusory," but the phrase in the text is its functional equivalent.

87. *Id.* at 344, 347.

88. *Id.*

89. *Id.* at 348.

90. *Id.* at 343.

91. See *Tuggle v. Wilson*, 280 S.E.2d 628 (Ga. Ct. App. 1981) (real estate contract contingent upon purchase of land to south and east of subject property both lacking in mutuality and fatally indefinite where contingency could refer to either of two tracts), *rev'd*, 282 S.E.2d 110 (Ga. 1981); see also *Leseke v. Nutaro*, 567 So. 2d 949 (Fla. 4th DCA 1990) (alleged settlement agreement held lacking in mutuality; court fails to note agreement is also indefinite as to critical contingency).

neither party performs marketing services, it is impossible for the court to ascertain who is in breach. Thus, the labor performed by the doctrine of consideration could have been performed just as easily, and more directly, by the requirement of definiteness.⁹²

The "past consideration" cases also provide frequent examples in which the requirement of definiteness is (or could be) a ground of decision alternate to consideration. Long-term employment relationships, in particular, seem to be a recurring source of promises held unenforceable on alternative grounds of "past consideration," failure of assent, or indefiniteness.⁹³ Typically, the employer, moved by gratitude over the employee's past performance, makes some vague, positive reassurance that the employee interprets as a contractual undertaking.⁹⁴ In many

92. Contracts in which each party reserves an unlimited termination right can likewise be accommodated by an application of the requirement of definiteness. Occasionally, one party terminates such a contract after performing for a substantial period of time, and a court denies recovery to the party bringing suit on the grounds that the termination right renders the plaintiff's own commitment illusory. The commitment of the other party is, therefore, void for lack of consideration. *See, e.g.*, *Pick Kwik Food Stores, Inc. v. Tenser*, 407 So. 2d 216 (Fla. 2d DCA 1981) (attempt to recover damages for defendant's breach of agreement to conduct retail gasoline business on premises of plaintiff's convenience store); *Interchange Assoc. v. Interchange, Inc.*, 557 P.2d 357 (Wash. Ct. App. 1976) (unsuccessful attempt to obtain specific performance of management contract containing unlimited resignation right). In such cases, the indefiniteness of the term of the agreement makes a prospective grant of damages speculative and an award of specific performance futile. Resort to the doctrine of consideration is therefore unnecessary.

93. Not all of the interesting examples occur in the employment context, however. *See, e.g.*, *Ponze v. Guirl*, 794 S.W.2d 699 (Mo. Ct. App. 1990). A woman (Ponze) gave her boyfriend (Guirl) a total of \$14,100 to invest on her behalf in the commodities market. *Id.* at 700. Naturally, Guirl lost his shirt, as well as all but about \$500 of Ponze's money. *Id.* Thereafter, Ponze alleged an oral agreement to the effect that, if Guirl could retain the remainder of Ponze's funds, he would repay her full investment with interest. *Id.* In addition, Guirl later signed a letter in which he "state[d] his intent" to repay \$13,100 with interest "as soon as practicable or upon the sale of his stock in the General Automatic Transfer Company." *Id.* at 701.

Ultimately, the court held the alleged oral agreement that followed the commodities trading losses fatally indefinite. *Id.* at 701-02. Specifically, the duration of the alleged loan was unspecified, and it was unreasonable to infer that Guirl would agree to pay \$14,100 on a \$511.99 loan with payment due on demand. *Id.* at 702. The subsequent "letter of intent" also failed to qualify as a contract on several grounds. In part, the court applied the objective theory of assent (without expressly mentioning it) and held the letter did not amount to a promise. By its express terms, the letter was a mere statement of intention. *Id.* In addition, the letter was transmitted long after the alleged loan was made, and thus was not supported by consideration. *Id.* Obviously, the result in the case would have been no different if the court had simply omitted its ruling on the issue of past consideration.

94. *See Spickelmier Indus., Inc. v. Passander*, 359 N.E.2d 563 (Ind. Ct. App. 1977) (promise to pay deferred portion of bonus for past services "when and if sufficient funds were available"); *Hayes v. Plantations Steel Co.*, 438 A.2d 1091 (R.I. 1982) (promise to "take care of" retiring employee held unenforceable because it was based on past consideration and was not a direct and definite promise to pay a pension); *Price v. Mercury Supply Co.*, 682 S.W.2d 924 (Tenn. Ct. App. 1984) (employee told he would "never have to worry about employment" because of past satisfactory services; held unenforceable for lack of consideration, mutual assent, and definiteness, and because statement was mere encouragement).

such cases, the promises in question are either too indefinite to enforce or too vague to be construed as a promise.⁹⁵ Thus, in a significant number of cases, the work performed by the doctrine of past consideration can easily be performed by ordinary assent doctrines.

D. *The Objective Theory of Assent*

Some of the cases discussed above also illustrate one further assent doctrine that can make the application of one of the corollaries to the doctrine of consideration redundant. Specifically, in some of the cases courts concluded that a reasonable person would classify the communications upon which suit was brought as something other than promises.⁹⁶ Such straightforward applications of the objective theory of assent⁹⁷ make the doctrine of consideration redundant. If communications do not amount to a commitment at the outset, the question whether they are "supported by consideration" need not arise.

Cases distinguishing promissory from non-promissory communications, however, exhaust neither the objective theory of assent nor its potential for supplanting applications of the doctrine of consideration. There is a class of communications that are clearly promissory in character but are too casual or trivial to be subjects for contractual enforcement.⁹⁸ The class is somewhat ill-defined, but it traditionally includes sham promises, jokes, at least some intrafamily promises, and social promises among friends (such as a promise to meet for lunch).⁹⁹ The objective theory of assent is sometimes used to deny enforcement to

95. See *supra* note 94; see also *Cardamone v. University of Pittsburgh*, 384 A.2d 1228 (Pa. Super. Ct. 1978) (promise to pay medical expenses of injured athlete "for all time or such period of time as the University may determine feasible"; document containing promise expressly disclaimed legal responsibility for accident and intent to create legal obligation).

96. See *Ponze v. Guirl*, 794 S.W. 699 (Mo. Ct. App. 1990) (past consideration case in which court also held alleged promise to be mere statement of intention); *Hayes v. Plantations Steel Co.*, 438 A.2d 1091 (R.I. 1982) (past consideration case in which alleged promise to "take care of" retiring employee held not to be direct and definite promise to pay pension); *Price v. Mercury Supply Co.*, 682 S.W.2d 924 (Tenn. Ct. App. 1984) (past consideration case in which alleged promises of job security held to be mere statements of encouragement and approval); see also *Parmenter v. Federal Deposit Ins. Corp.*, 925 F.2d 1088 (8th Cir. 1991) (alleged post-harvest promises of payment to agricultural land lessors by FDIC held lacking in mutuality of obligation; "promises" may have been mere predictions of availability of funds); *Springfield Television, Inc. v. Gary*, 628 S.W.2d 398 (Mo. Ct. App. 1982) (past consideration case in which owner's vague statement that he would "take care of" corporate debt probably did not amount to a promise); *Cardamone v. University of Pittsburgh*, 384 A.2d 1228 (Pa. Super. Ct. 1978) (past consideration case in which alleged promise to pay medical expenses expressly disclaimed intent to create legal obligation).

97. See FARNSWORTH, *supra* note 11, § 3.6 (discussing objective theory of assent).

98. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 86 (3d. ed. 1986); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 572-73 (1933); Kull, *supra* note 10, at 40 n.3; Posner *supra* note 10, at 416-17.

99. See FARNSWORTH, *supra* note 11, § 3.7 (summarizing types of cases within this class).

such promises. Such promises, by virtue of their terms or the circumstances surrounding their utterance, indicate to a reasonable person an intention not to be bound.¹⁰⁰ It has been suggested, however, that the doctrine of consideration is also used to mark out this class of promises and exclude them from the realm of contract.¹⁰¹

An illusory promise case, *Universal Computer Systems, Inc. v. Medical Services Ass'n of Pennsylvania*,¹⁰² provides an example. Blue Shield of Pennsylvania solicited bids for a computer lease.¹⁰³ The solicitation required that bids be received by Blue Shield at its office by noon of the day specified as a deadline.¹⁰⁴ Plaintiff Universal prepared a bid proposal but completed it too close to the deadline for ordinary mail service.¹⁰⁵ Universal's president phoned the Blue Shield employee charged with receiving bids, and the latter promised to pick up Universal's bid at the airport and transport it to Blue Shield's offices before the noon deadline.¹⁰⁶ Universal's president dispatched the proposal to the appropriate airport via an airline express delivery service.¹⁰⁷ When he called the Blue Shield employee to give him the airbill number, however, the employee informed him that he had changed his mind and would not pick up the bid.¹⁰⁸ As a result,¹⁰⁹ the bid did not arrive in

Some add promises involving very low stakes. See Posner, *supra* note 10, at 417. In my view, some campaign promises of politicians also belong in this class.

100. See FARNSWORTH, *supra* note 11, § 3.7; RESTATEMENT (SECOND) OF CONTRACTS § 21; see also Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022, 1027-30 (1992) (suggesting that the key to distinguishing enforceable from unenforceable promises is the manifestation of an intention to be legally bound).

101. Judge Posner, in particular, regards it as part of the function of the doctrine of consideration to isolate and deny enforcement to such trivial promises. See POSNER, *supra* note 98, at 86; Posner, *supra* note 10, at 414-17. Posner recognizes that some promises that the doctrine of consideration classifies as gratuitous might nevertheless be utility-enhancing transactions if enforceable. Posner, *supra* note 10, at 412-14. The enhanced utility of a gratuitous present transfer is explainable in terms of the phenomenon of interdependent utilities. *Id.* at 412. Utility gains would be produced by making at least some gratuitous promises enforceable because enforcement increases the probability of a future performance and thus increases the anticipated present value of a series of future transfers. *Id.* at 412-14. If the common law doctrine of consideration really invalidated all gratuitous promises, however, Posner's thesis that the common law is efficient would be threatened. There would be a class of utility-enhancing but unenforceable promises. Accordingly, he argues (1) that the promises actually invalidated by the doctrine of consideration are of the trivial kind for which the cost of enforcement is larger than the gains realizable through enforcement; and (2) that exceptions to the doctrine have been carved out where gains beyond the cost of enforcement are likely. *Id.* at 416-25.

102. 474 F. Supp. 472 (M.D. Pa. 1979).

103. *Id.* at 475.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. The causal sequence leading to the untimely delivery of the bid is the stuff of which law

time to meet the deadline, and, though it would have been the low bid, it was returned unopened.¹¹⁰

Universal sued Blue Shield for breach of the promise to pick up the bid, relying on both contract and promissory estoppel theories. A jury verdict in Universal's favor was set aside by the court, however, primarily on the grounds that the Blue Shield employee lacked authority to make the promise.¹¹¹ In addition, the court found that Universal had not given any consideration for the promise. Since Universal was not bound to submit a bid at all, its commitment was illusory and would not provide sufficient consideration for Blue Shield's promise to pick up the bid.¹¹²

The result in *Universal Computer* is a bit harsh, and it is possible to challenge the court's reasoning at a number of points.¹¹³ If the case is correct at all, it is because the promise of the Blue Shield employee falls into the class of casual promises too trivial to enforce. Indeed, a proponent of the doctrine of consideration might argue that it is the illusory character of Universal's return promise that makes Blue Shield's promise to pick up the bid trivial. The absence of consideration, it could be argued, shows that the Blue Shield employee's promise was made without adequate deliberation¹¹⁴ or was merely casual, much like the prom-

professors' hypotheticals are made. Universal tried to retrieve its bid from the destination airport through the use of a local courier service. *Id.* at 475. Unfortunately for Universal, the airline that had custody of the package initially refused to release it to anyone except an employee of the consignor, Universal, or an employee of the consignee, Blue Shield. *Id.* The former were too distant to arrive in time, and the latter were unwilling to do so.

110. *Id.* at 475.

111. The court's finding that the Blue Shield employee lacked authority to make the promise was based on the premise that such favored treatment would amount to a bid preference in favor of Universal and would, accordingly, violate applicable federal procurement regulations. *Id.* at 476-77. The court also concluded that Universal should have been aware of the relevant regulations. Therefore, Universal's reliance on a promise that would violate them was unreasonable. *Id.* at 477-79. The finding of unjustifiable reliance doomed Universal's promissory estoppel claim.

112. *Id.* at 477.

113. For example, the relevant federal regulations could have been construed somewhat less strictly, so that merely picking up a bid at the airport would not amount to an illegal bid preference. Such a construction would remove the court's basis for a finding that the Blue Shield employee lacked authority to make the promise at issue. Indeed, even a ruling that the federal regulations were ambiguous would presumably have permitted the court to conclude that Universal's reliance on the promise was reasonable. Such a conclusion would have saved Universal's promissory estoppel claim, which otherwise seems quite meritorious. But even if the court's conclusion that the promise in question would violate federal bidding regulations is correct, it would seem more appropriate to decide the case directly by sustaining a defense of illegality, rather than taking the circuitous route of agency theory and consideration doctrine.

114. See Fuller, *supra* note 77 (arguing that the doctrine of consideration helps assure adequate deliberation). Fuller, of course, regarded the assurance of deliberation as a function of legal formalities generally and not as a function uniquely performed by consideration doctrine.

ise to do a favor for a friend.¹¹⁵

The defender of consideration doctrine might generalize his argument as follows: While there may be some disagreement about the scope of the class or its exact description, everyone agrees that there is a class of promises that should not be enforced as contracts.¹¹⁶ It follows that contract law needs a gatekeeper doctrine that will exclude the suspect class from the domain of contract. Admittedly, the objective theory of assent would do the job most directly. The real concern is whether a reasonable person would consider a particular promise to be "seriously intended," "sufficiently deliberate," "more than social or casual," or "made with the intent to affect legal relations."¹¹⁷ Testing directly for intent or deliberation, however, at least sounds like a messy factual inquiry, while determining the presence or absence of consideration can often be adjudicated summarily. Thus, if consideration doctrine really does pick out the offensive class of promises, it may be a more efficient way to do so and thus a better gatekeeper.¹¹⁸

The flaw in the foregoing argument is that the correlation between the class of casual promises and the absence of consideration is not sufficiently high to result in the claimed economy of disposition. On the one hand, certain promises that lack consideration are serious and deliberate. Large charitable subscriptions are probably the best example.¹¹⁹ At the opposite end of the spectrum, many of the casual promises that technically satisfy the doctrine of consideration should be unenforce-

115. Unfortunately, the court's opinion does not contain a transcript or detailed description of the conversation in which the Blue Shield employee made the promise. As a result, there is no direct way for a reader to determine whether the promise was serious or casual or even if the court had evidence relevant to such a determination before it. Indeed, if the promise had been serious (and were not tainted by illegality), many contract scholars would probably favor its enforcement, as the evidence of reliance is unequivocal.

116. See Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 2-7 (1979); E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 591 (1969); C.J. Hamson, *The Reform of Consideration*, 54 LAW Q. REV. 233, 244-45 (1938); Harold C. Havighurst, *Consideration, Ethics and Administration*, 42 COLUM. L. REV. 1, 12 (1942); Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 942-43 (1958); Samuel Stoljar, *Enforcing Benevolent Promises*, 12 SYDNEY L. REV. 17, 19 (1989); Arthur T. von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009, 1015-16 (1959); Lord Wright, *Ought the Doctrine of Consideration to Be Abolished from the Common Law?*, 49 HARV. L. REV. 1225, 1228-29 (1936); see also *supra* notes 98-101.

117. I do not suggest that the quoted phrases are synonymous. They are, however, examples of ways in which various commentators have tried to describe the class of promises for which enforcement should be denied. See *supra* notes 98-101, 116 and accompanying text.

118. Professor Barnett makes a similar suggestion, although he recognizes the limitations of consideration doctrine as an indicator of intention to be bound. See Barnett, *supra* note 100, at 1029.

119. See RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (1979) (recommending the enforcement of charitable subscriptions without proof of consideration or reliance).

able. Sham transactions designed to mislead third parties are almost inevitably cast in the form of bargains,¹²⁰ and the same may be true of mere jokes.¹²¹ Even my social promise to meet a friend for lunch may be conditioned on his promise to meet me and so qualify as a bargain.¹²² Without a close correlation between applications of the doctrine of consideration and membership in the class of casual promises, the doctrine of consideration cannot be used as a proxy for the objective theory of assent. If consideration is absent (as in the case of charitable promises), one must still ask whether the promise in question is "serious" or "deliberate" or accompanied by "legal intent." Conversely, even if consideration is technically present, a promise might still be a sham, a joke, or a mere social engagement. The appeal to the objective theory of assent must be made in any event. The attempt to use consideration as a way of isolating the class of promises too casual¹²³ to be enforced accomplishes nothing.¹²⁴

E. *The Primacy of Assent*

Thus, to the extent that the corollaries to the doctrine of consideration overlap with applications of the objective theory of assent,¹²⁵ the assent doctrine is clearly primary. As suggested earlier, however, the corollaries to the doctrine of consideration are often rendered redundant by other aspects of the general requirement of mutual assent.¹²⁶ It is therefore appropriate to ask whether assent doctrine is similarly primary in those cases. If some cases in which consideration is lacking are also

120. See, e.g., *Ratchford v. United States Cent. Underwriters Agency, Inc.*, 492 F. Supp. 137 (E.D. Mo. 1980) (guaranties executed to make stock offering more attractive; false recitals of consideration).

121. See FARNSWORTH, *supra* note 11, § 3.7 (examples of sham and joke cases).

122. See SUTTON, *supra* note 30, at 227; Wright, *supra* note 116, at 1228. Of course, if I promise to buy my friend lunch, the requirement that he meet me may be a mere condition attached to a gift, not a bargain promise. But I am not so altruistic that the majority of my social promises slide out of the category of bargain into that of gift, and I see no reason to assume that most social promises are gratuitous rather than reciprocal.

123. If, as Posner suggests, it is our goal to screen out promises or transactions in which minimal amounts are at stake, some form of jurisdictional amount requirement would appear to be a more direct and clear-cut means of accomplishing it. See POSNER, *supra* note 98, at 86; Posner, *supra* note 10, at 416-17. Indeed, Professor Gordon has argued that the law of damages already screens out claims for trivial injuries. See Gordon, *Dialogue*, *supra* note 7, at 995.

124. It might be appropriate in some cases to use the absence of consideration as one relevant fact tending to support the conclusion that a promise is too casual to be enforced. In a case like *Universal Computer*, for example, the fact that a gratuitous promise is made in a business context (where one normally expects exchanges) may be anomalous enough to have some evidentiary value. However, the use of the absence of consideration as one evidentiary fact among many is very different from assigning it a lone and conclusive gatekeeping function appropriate for summary disposition.

125. See *supra* part II.D.

126. See *supra* part II.A-C.

cases in which agreement is lacking entirely (or lacking in finality or definiteness), the principle of theoretical economy would suggest that one of the twin grounds of decision—lack of consideration or failure of assent—could be eliminated in favor of the other.¹²⁷ One might ask, however, why the consideration corollary rather than the relevant doctrine of assent should be eliminated.

The answer begins with a recognition that the overlap between lack of consideration and failure of assent is not entirely coincidental. This is most obvious in the case of illusory promises. A promise equivalent to "I will if I so desire" is certainly questionable. It was recognized long ago, however, that the questionable nature of illusory promises is best explained by the simple observation that they are not promises at all.¹²⁸ The alleged promisor has made no real commitment and so has not made anything that would be recognized as a genuine promise.¹²⁹ This presumably is why illusory promises do not suffice as consideration. If one accepts the further premise that both offers and acceptances are normally promissory,¹³⁰ it becomes obvious that cases in which a finding of lack of consideration is based on the illusory character of one party's promise will also frequently be cases in which assent is lacking or not final.

Llewellyn generalized the same point more broadly by observing

127. The statement in the text assumes that one regards theoretical simplicity and economy as a virtue. I have indicated elsewhere that I so regard it. See Mark B. Wessman, *Purchase Money Inventory Financing: The Case for Limited Cross-Collateralization*, 51 OHIO ST. L.J. 1285, 1322 n.258 (1990) (applying the principle of theoretical economy known as "Ockham's razor"). While there is probably broad agreement that theoretical economy is a desirable goal in legal theory, the strength of its appeal varies among scholars. Those whose theoretical tastes run to the ornate may thus not find the mere redundancy of consideration as strong a reason to abandon it as I do. Such individuals may, however, be more impressed with the argument made in parts III. and IV., *infra*, that the corollaries to the doctrine of consideration do positive harm.

128. See, e.g., ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 145 (1952).

129. This is perhaps most obvious in cases in which an attempt is made to enforce the illusory promise itself. Doctrines of assent, rather than consideration, typically play the major role in the disposition of such cases, because the return promise is often (though not invariably) a real one. See *Rosenberg v. Lawrence*, 541 So. 2d 1204 (Fla. 3d DCA 1988); *People v. Tobler*, 397 N.Y.S.2d 325 (N.Y. Sup. Ct. 1977); *Wharf Restaurant, Inc. v. Port of Seattle*, 605 P.2d 334 (Wash. Ct. App. 1979). Sometimes, courts analyzing illusory promises seem to confuse doctrines of assent and consideration. See, e.g., *In re Anchorage Boat Sales, Inc.*, 29 B.R. 275 (Bankr. E.D.N.Y. 1983) (court refuses to enforce trustee's illusory promise to pay rent on ground the rental arrangement "tenders no consideration recognizable" under applicable law; return commitment substantial); *Felice v. Clausen*, 590 P.2d 1283, 1285 (Wash. Ct. App. 1979) (illusory promise held not to be an offer and thus unenforceable; court concludes consideration absent in spite of substantial return promise).

130. Obviously, in stating this generalization I am deliberately ignoring the case of unilateral contracts in which, by definition, the acceptance takes the form of an action other than a promise. See RESTATEMENT (SECOND) OF CONTRACTS §§ 30, 32 (1979). The drafters of the *Restatement* recognized the possibility of non-promissory offers or acceptances, but they clearly regarded promissory varieties of both as the more common and prototypical cases. See *id.* §§ 24 cmt. a, 50 cmt. c.

that, in analyzing the prototypical executory bilateral contract, the courts had manipulated the doctrine of consideration to the point where its overlap with offer and acceptance was virtually automatic.¹³¹ In most business contracts there are promises on both sides and, at least at the outset, neither side has performed. In such business deals, formation (and so assent) precedes performance. The business person involved in such a deal considers his "inducement" for entering into it or what he was "bargaining for" to be the actual performance by the other party.¹³² The lay person's conception that lies behind the legal notion of consideration is thus related to actual performance, not the promise of performance. Actual performance, however, cannot be the consideration that supports a bilateral executory contract, because consideration must be present at the inception of the agreement. The quite sensible response of the courts, as Llewellyn observed, was to manipulate the notion of consideration so that the promise that constitutes the offer or acceptance, though of only minor value to the business person, satisfies the technical requirement of consideration.¹³³ In this important class of cases, therefore, offer, acceptance, and consideration will typically coincide.¹³⁴

Not all contracts, of course, fit the model of the simple executory bilateral, and the correlation between assent and consideration will thus be only partial. But if, in those cases in which assent doctrines and consideration doctrine do duplicative work, theoretical economy moves us to dispense with one of them, Llewellyn's observations provide at least historical reason to regard assent as primary and consideration as dispensable. Faced with a potential conflict between consideration and assent in the executory bilateral agreement, the courts twisted consideration doctrine until it no longer threatened business agreements blessed by doctrines of assent as well as commercial practice. The fact that consideration had to yield in favor of assent, however, indicates that, in practice, assent doctrine is more fundamental.

Indeed, quite apart from Llewellyn's historical analysis, there is reason to regard assent as more fundamental to contract theory and doc-

131. See Karl N. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance*, II, 48 YALE L.J. 779, 784, 787 (1939).

132. "[I]n the bilateral situation the first and outstanding fact of life is that outside of lunatic asylums real people do not in good faith offer 'a promise for a promise.'" *Id.* at 789. While Llewellyn's insight seems unassailable, its contrary has occasionally been argued. See, e.g., James Barr Ames, Note, *Two Theories of Consideration: II. Bilateral Contracts*, 13 HARV. L. REV. 29, 31-32 (1899) (arguing that each party to a bilateral executory contract bargains for the promise of the other quite apart from its legal effect).

133. "[I]n the bilateral situation horse-sense about agreeing has forced such modification of the orthodox 'detriment' theory of consideration as has proved necessary to make room for bilateral executory obligation." Llewellyn, *supra* note 131, at 787.

134. *Id.*

trine than consideration. Notions of "agreement" and "promise" are definitive of contracts viewed as a separate field of law.¹³⁵ Much of the debate between the "death of contract" theorists and their opponents reduces to a dispute over the extent to which contract consists of obligations voluntarily assumed by promising as opposed to obligations collectively imposed in a manner analogous to the field of torts.¹³⁶ Even those who regard socially-imposed duties as dominant, however, concede some role in contract for the intentions of the parties.¹³⁷ Indeed, in the absence of a state-planned economy or industry so vertically integrated that resources are allocated by executive authority, it is difficult to imagine or describe either the economy or contract without invoking notions of voluntary agreement.¹³⁸ The doctrines that correlate to these core notions of agreement and promise are the various doctrines of assent,¹³⁹ not the rules grouped under the doctrine of consideration. Thus, in cases in which consideration and assent do duplicative work and one is to be eliminated, it is consideration that must go. Assent is not only historically primary; contract as we know it cannot even be conceived without it.¹⁴⁰ The same is not true of the doctrine of consideration.

135. See RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979) (defining the term "contract" in terms of a promise or set of promises); see also FRIED, *supra* note 9, at 1-2, 7-14, 17-21, 40-54 (arguing that the "the promise principle" explains the bulk of contract law); Wright, *supra* note 116, at 1225-26 (observing that the use of consideration as a test of enforceability is a common law peculiarity and that other legal systems focus more directly on the manifestation of serious, deliberate intention to create legal relations).

136. See FRIED, *supra* note 9, at 4-5, 21-27, 57-74; GILMORE, *supra* note 2; Barnett, *supra* note 100, at 1023-26; Peter Linzer, *Uncontracts: Context, Contorts, and the Relational Approach*, 1988 ANN. SURV. AM. L. 139; Patrick S. Atiyah, Book Review, 95 HARV. L. REV. 509 (1981).

137. See Linzer, *supra* note 136, at 142; Atiyah, *supra* note 136, at 515.

138. See Fuller, *supra* note 77, at 809; Llewellyn, *supra* note 24, at 782; Llewellyn, *supra* note 30, at 717.

139. It has been argued, for example, that the very concept of a promise presupposes at least a rudimentary form of acceptance by the promisee. If a promise is to be distinguished from a threat, it must be "wanted" or "taken up" by the promisee. See FRIED, *supra* note 9, at 40-43; Samuel Stoljar, *Promise, Expectation, and Agreement*, 47 CAMBRIDGE L.J. 193, 198-200 (1988). At least a primitive form of the offer/acceptance structure of mutual assent thus seems built into the very notion of a promise.

140. I am not suggesting that all contract duties are defined in scope by the intentions of the parties. Even the objective theory of assent is a partial departure from the true intentions of the parties. Llewellyn realized that many rules of contract law function as background rules that the parties simply presuppose while they negotiate the few dickered terms of a contract. The parties do not so much expressly choose the background terms as fail to displace them. See Karl N. Llewellyn, *Common-Law Reform of Consideration: Are There Measures?*, 41 COLUM. L. REV. 863, 869-70 (1941). More recently, it has become fashionable to refer to such background rules as "default rules," presumably by analogy to the default drive on a computer, and to contrast them with both the expressly negotiated terms and the "immutable rules" of contract law that cannot be displaced by agreement. See, e.g., Ian Ayres & Robert Gertner, *Filling in Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

III. CONSIDERATION AS A POLICING DEVICE

A. *Consideration as an Alternate Method of Policing Misconduct in Bargaining*

The preceding section focused on cases in which one of the corollaries to the doctrine of consideration was (or could have been) rendered superfluous by an application of one or more of the doctrines collected under the rubric of mutual assent. In a substantial number of cases, however, the corollaries travel in tandem with legal doctrines designed to police the bargaining process for deception or improper pressure. In some instances, consideration doctrine is clearly superfluous because the requirements of a defense such as fraud, duress, or undue influence are clearly satisfied. In addition, there are a few cases in which the facts suggest such alternate defenses, but the factual record does not clearly establish any one of them. In the latter class of cases, the doctrine of consideration appears to function as a surrogate for such defenses. The question becomes whether that is a proper function. That question will be addressed after a few illustrations.

1. FRAUD AND FRAUD ON CREDITORS

An example of the use of the doctrine of past consideration to avoid giving effect to a promise arguably procured by deception is provided by *Fourticq v. Fireman's Fund Insurance Co.*¹⁴¹ Fourticq owned an interest in an insurance agency that sold insurance for Fireman's Fund.¹⁴² While an owner, Fourticq had personally guaranteed the agency's obligation to remit premiums to Fireman's Fund.¹⁴³ Fourticq sold his ownership interest when the agency was restructured, and Fireman's Fund signed an agency agreement with a successor agency in which Fourticq had no ownership interest.¹⁴⁴ More than a month later, Fireman's Fund obtained Fourticq's signature on a guaranty of the successor agency's obligations under the new agency agreement.¹⁴⁵ The guaranty falsely recited that it was given in return for the execution by Fireman's Fund of the agency agreement with the successor agency.¹⁴⁶ What Fourticq did not know and was not told was that Fireman's Fund had given notice of termination of that agency agreement nearly a month earlier, only one week after its execution.¹⁴⁷ Fourticq thus guaranteed obligations that

141. 679 S.W.2d 562 (Tex. Ct. App. 1984).

142. *Id.* at 563.

143. *Id.*

144. *Id.*

145. *Id.* at 563-64.

146. *Id.* at 564.

147. *Id.* at 563-64.

Fireman's Fund had already made much more difficult or impossible for the agency to meet. The court had no difficulty invalidating the guaranty on the traditional ground that new consideration must support a guaranty or indemnity agreement executed after the initial extension of credit to the primary obligor.¹⁴⁸ It is likely, however, that the conduct of Fireman's Fund amounted to fraudulent concealment,¹⁴⁹ and defenses of mistake, unconscionability, or breach of the duty of good faith might have been available as well.

Occasionally, a transfer or a promise ostensibly based on past consideration is an indication, not that the promisor has been deceived or improperly pressured, but that the parties are colluding to defraud creditors. Where a transaction is still executory, of course, the use of the doctrine of past consideration as a gatekeeper can produce the same result as fraudulent conveyance law.¹⁵⁰ The Rub brothers of North Dakota learned this lesson to their chagrin in *Production Credit Ass'n of Mandan v. Rub*.¹⁵¹ The Production Credit Association (PCA) attempted to foreclose on a security interest in the livestock and equipment of one of the brothers, Duane Rub.¹⁵² The chief obstacle to PCA's success was a rival six-figure note and a security agreement covering much of the same collateral executed in favor of Duane's brother Jeffrey and his wife.¹⁵³ Duane and Jeffrey were evasive when asked what value had

148. *Id.* at 564-65. I shall present an argument in favor of abandoning this traditional rule. See *infra* part III.A.4.

149. See RESTATEMENT (SECOND) OF CONTRACTS §§ 161(b), 162-164.

150. In one such case, a finding that a transfer lacked consideration was simply a subsidiary finding of the court necessary to sustain a successful attack on the transfer on the ground that it was a fraudulent conveyance. *Tcherepnin v. Franz*, 457 F. Supp. 832 (N.D. Ill. 1978). When an Illinois savings and loan association collapsed and went into federal receivership in 1969, its receiver filed a tort suit against a Mr. Knight. Years later, the receiver obtained a judgment of nearly \$14 million. In 1970, however, Knight had conveyed some valuable real estate into a trust for the benefit of four non-profit organizations, including a college and a medical school. When the federal receiver sought to set aside the conveyance to the trust as fraudulent, both the college and the medical school argued that they had provided valuable consideration for the transfer. The college argued that its interest was obtained in exchange for help it had given Knight in a 1954 eminent domain dispute with the federal government. The medical school was equally creative. It contended its interest in the land trust was acquired in return for free medical services rendered to Knight for twenty-five years by one Dr. Wood, who in return had asked Knight to endow a chair at the medical school in his honor. The court concluded that neither the past medical services nor the past assistance in resisting the federal power of eminent domain amounted to consideration for the real estate conveyance because neither were bargained for in exchange for the conveyance. Once it concluded that the transfer was without consideration, the court satisfied itself that the remaining elements of a fraudulent conveyance were present and ultimately set aside the transfer of the land. Obviously, even if the doctrine of consideration were deprived of its general gatekeeping function, its use in favoring equitable distribution among creditors through fraudulent conveyance law could, and should, continue.

151. 475 N.W.2d 532 (N.D. 1991).

152. *Id.* at 533.

153. *Id.* at 533, 535.

been given in exchange for the note and security agreement.¹⁵⁴ Duane could not recall why he had given Jeffrey the security interest and was unable to recall any cash changing hands.¹⁵⁵ Apart from "love and affection," the only candidate for consideration was farm work (of an unspecified amount and duration) done by Jeffrey, apparently in the past.¹⁵⁶ The trial court found the whole transaction fraudulent and the note and security agreement without consideration. The appellate court affirmed.¹⁵⁷ PCA prevailed, and again it is clear that the fraud-on-creditors theory alone would have sufficed for the court's purposes. Other past consideration cases are similar, although in some instances the fraud on creditors is less clear.¹⁵⁸

Fourticq and *Rub* were cases in which the doctrine of "past consideration" could clearly be replaced by a traditional policing defense. In one mutuality of obligation case, *Sorrells v. Bailey Cattle Co.*,¹⁵⁹ the evidence of fraud is not quite as strong. Mr. and Mrs. Sorrells were two nice city people who were fleeced by a somewhat more shrewd country land broker, Mr. Bailey. The Sorrellses first contacted Mr. Bailey at his real estate brokerage office for the purpose of buying land in a particular Arkansas county.¹⁶⁰ After the Sorrellses were shown some property, they entered into two successive agreements with Mr. Bailey's cattle company, which owned the thirty acres of land the Sorrellses had selected.¹⁶¹ The first was a standard offer and acceptance form. It specified the total price, a \$2700 earnest money payment, a ten-year amortization period for the balance, and approximate monthly payments.¹⁶² The Sorrellses, however, were unfamiliar with the methods for giving a proper legal description of rural land, and the offer and acceptance form did not contain one.¹⁶³ For reasons that are not clear, the Sorrellses later

154. *Id.* at 535-36.

155. *Id.*

156. *Id.* at 535.

157. *Id.* at 535-36.

158. See *In re Levine*, 23 B.R. 410 (Bankr. S.D.N.Y. 1982) (execution of mortgage bond and mortgage to sister and brother-in-law reflecting series of advances made over preceding seventeen years), *rev'd*, 32 B.R. 741 (S.D.N.Y. 1983); *Abraham v. Abraham*, 279 N.W.2d 85 (Neb. 1979) (assignment of interests in contract for sale of restaurant business prompted by fear of assignor's potential civil liability arising out of theft). The factual record in such cases is murkier than that in *Tcherepnin* and *Rub* and lends less support for a finding of fraud on creditors. It is therefore possible that the elimination of the gatekeeping function of the doctrine of consideration would require greater diligence on the part of litigants in building factual records or, if that proved impractical, relaxation of the evidentiary standards of proof for fraudulent conveyances or fraud on creditors.

159. 595 S.W.2d 950 (Ark. Ct. App. 1980).

160. *Id.* at 952.

161. *Id.* at 952-53.

162. *Id.* at 952.

163. *Id.*

executed a second agreement, designated a "Purchaser's Agreement," apparently for the same land but also without a legal description or identification.¹⁶⁴ The purchaser's agreement differed from the offer and acceptance form in three ways, all favorable to Bailey.¹⁶⁵ The most convenient change postponed Bailey's obligation to deliver a deed and an abstract of title until the purchase price was paid in full some ten years later.¹⁶⁶ That provision was particularly advantageous to Mr. Bailey because, at the time of the sale to the Sorrellses, he was probably unable to convey marketable title.¹⁶⁷ This rather inconvenient fact was not disclosed to the Sorrellses at the time of the purported sale to them.¹⁶⁸ The Sorrellses were never furnished evidence of Bailey's title, and neither the offer and acceptance form nor the Purchaser's Agreement was in recordable form.¹⁶⁹ The Sorrellses were, therefore, unable to give notice of their equitable interest in the land.¹⁷⁰ In fact, they apparently had no means of access to the land, because Bailey had failed to fulfill an oral side agreement to build an access road to the Sorrellses' tract across land of his own.¹⁷¹ When the Sorrellses fell behind in their payments, they listed the land for sale, unwisely choosing Mr. Bailey as their real estate agent. Mr. Bailey apparently made no efforts to find a buyer.¹⁷² Ultimately, the Sorrellses filed a suit in equity, seeking rescission of the whole transaction.¹⁷³ In a stunning display of judicial error, the local chancery court refused to order rescission, entered judgment against the Sorrellses personally, and decreed foreclosure with respect to the land.¹⁷⁴

The more merciful appellate court reversed.¹⁷⁵ The court had a variety of grounds for reversing the decision.¹⁷⁶ One ground was a rul-

164. *Id.* at 952-53.

165. *Id.* at 953.

166. *Id.* The other two changes were the addition of a provision for the payment of interest and a reservation to Bailey of one-half the mineral rights in the land. *Id.*

167. *Id.* at 957. Bailey had mortgaged the thirty acres in question to a Little Rock bank to secure a \$300,000 loan, and the bank apparently had no obligation to release the thirty acres until the entire balance of the loan was paid. *Id.*

168. *Id.*

169. *Id.* at 953, 957.

170. *Id.* at 957.

171. *Id.* at 953, 958.

172. *Id.* at 953.

173. *Id.* at 951.

174. *Id.* at 952-54.

175. *Id.* at 959.

176. Specifically, the absence of any document containing a legal description of the land made the agreement run afoul of both the Statute of Frauds and the requirement of definiteness. *Id.* at 954-56. Bailey's failure to build an access road, furnish a survey, and provide an abstract of title (or title insurance) amounted to substantial breaches of the initial agreement, thus excusing the Sorrellses. *Id.* at 958-59.

ing that the second agreement deprived the buyers of benefits with no corresponding change in the seller's rights or duties. Thus, it failed for "lack of mutuality of consideration."¹⁷⁷

There are two interesting aspects of *Sorrells* for purposes of this Article. First, it is yet another case in which the discussion of mutuality is superfluous. The court could have based its decision on the Statute of Frauds and the requirement of definiteness, both of which were discussed. More importantly, *Sorrells* is a particularly good illustration of the way in which courts use the technical requirements of the doctrine of consideration as a covert way of policing transactions for unfairness or misconduct. It is impossible to read the facts of *Sorrells* and avoid the feeling that the Sorrellses were cheated. The terms of the deal were unusually advantageous to the seller, and, even apart from Mr. Bailey's failure to disclose important information, one suspects that he was not always a model of candor. Yet, there apparently was nothing in the record which amounted to an actual fraudulent misrepresentation. While the deal may have been sufficiently one-sided to qualify as substantively unconscionable, there was apparently no evidence of the deception, overreaching, or exploitation of dramatically superior bargaining power that is more characteristic of cases in which agreements are invalidated on grounds of unconscionability.¹⁷⁸ It may be that the availability of mutuality and other technical grounds for invalidating the agreement simply channeled the development of the factual record. If it is unnecessary to prove fraud or unconscionability, litigants may shy away from the messy factual issues upon which those defenses often depend. There is the somewhat more disturbing possibility, however, that the Sorrellses were so ripe for the plucking that Bailey did not need to do anything fraudulent or unconscionable to take advantage of them. If so, a defender of the doctrine of consideration might argue that it has been used, along with other technical defenses, to reach what is arguably the fair result without the necessity of resorting to defenses which are more difficult to prove under current standards.¹⁷⁹ I shall address this argu-

177. *Id.* at 956-57.

178. See 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 197-232 (3d ed. 1988) (discussing the distinction between substantive and procedural unconscionability).

179. A similar use of consideration doctrines as a covert way of policing a transaction for deception occurred in a somewhat curious case, *Boise Cascade Corp. v. First Sec. Bank of Anaconda*, 600 P.2d 173 (Mont. 1979). A dealer in modular homes, Mountain Sales, Inc., sold a modular house to a group of real estate developers. The house had been manufactured by Boise Cascade, and work on it had been completed before the sale took place. The funds for the purchase were to be provided by the developers' bank, the First Security Bank of Anaconda. Somehow, the dealer (Mountain Sales) persuaded the developers and the bank to execute two separate documents, both characterized as "assignments of funds." Each document recited (falsely) that the assignment of funds was given as an inducement to start production of the

ment following an analysis of similar patterns in duress and undue influence cases.

2. DURESS

Applications of the corollary concerning past consideration include cases in which the promise supported only by past consideration was extracted by threats amounting to duress. In some cases, the most primitive form of duress, the threat of physical violence, is established. *Quazzo v. Quazzo*¹⁸⁰ was a tale of the tangled dealings between a husband, Ugo, his wife, Jacqueline, and his sister, Ada.¹⁸¹ Between 1962 and 1969, Ugo and Jacqueline spent about \$100,000 renovating their house.¹⁸² Ada claimed that she was the source of the funds.¹⁸³ In 1969, Ugo and Jacqueline executed a note and mortgage in the amount of \$100,000 in Ada's favor.¹⁸⁴ The mortgage was not recorded until 1972,

modular home. One document, however, assigned \$26,000 (the total purchase price) to Mountain Sales (the dealer) and its bank, as joint payees, while the other document assigned the same amount to Mountain Sales and Boise Cascade as joint payees. The purchasers and the bank thus incurred inconsistent disbursement obligations with respect to a single loan. Mountain Sales obtained one developer's signature on both documents, apparently by telling him they were just "necessary for the files." While the court's opinion gives no description of similar conversations between the bank and Mountain Sales, it appears that the two documents were presented to the bank for signature four months apart. The bank eventually paid the loan proceeds to Mountain Sales. Mountain Sales did not, however, pay Boise Cascade for the modular house, and, shortly thereafter, Mountain Sales became insolvent. Boise Cascade then sued the bank on the second of the assignments of funds.

The trial held that the second assignment failed for "lack of consideration and lack of mutuality," and the appellate court affirmed. The construction for which the assignment was allegedly an inducement had been completed long before the assignment was executed, and Boise Cascade neither did anything for the bank nor promised anything to the bank. Indeed, there were not even any communications between the bank and Boise Cascade. The court concluded that the bank's promise to segregate and disburse the loan funds was gratuitous and unenforceable. The court's conclusion that the promise in favor of Boise Cascade was gratuitous seems unassailable. However, it is at least arguable that a written commitment by a bank to segregate and disburse funds in a particular manner ought to be enforceable regardless of the presence or absence of consideration. Certainly, such a commitment is the sort of promise that would tend to generate reliance in the commercial world. Cf. *Miles Homes Div. of Insilco Corp. v. First State Bank of Joplin*, 782 S.W.2d 798 (Mo. Ct. App. 1990) (gratuitous promise by first priority lender to give notification of delinquency or foreclosure to second priority lender held enforceable on theory of promissory estoppel). Yet the result in *Boise Cascade* has a certain intuitive appeal, probably because it is difficult to imagine why a bank officer would do something as stupid as executing both of the assignments at issue unless he was deceived or subjected to improper pressure. Consideration doctrine thus seems to have derailed an unfair deal when more traditional defenses may not have been provable.

180. 386 A.2d 638 (Vt. 1978).

181. *Id.* at 639.

182. *Id.* at 640.

183. *Id.* The advisory jury refused to believe her.

184. *Id.* at 639-40.

when the marriage between Ugo and Jacqueline terminated.¹⁸⁵ Ada sought to foreclose the mortgage at that time but was unsuccessful for two reasons.¹⁸⁶ First, the court noted that the note and mortgage were executed long after the expenditures in question were made and consequently were not part of a bargained exchange.¹⁸⁷ The note and mortgage thus failed for lack of consideration.¹⁸⁸ In addition, there was evidence that Jacqueline only executed the note and mortgage because Ugo threatened to drop her out the window, smash her face, or terminate the marriage.¹⁸⁹ Accordingly, the trial court found (and the appellate court affirmed) that the note and mortgage were executed under duress.¹⁹⁰ Consideration doctrine and the defense of duress were thus used in tandem.

Similar parallel uses of duress and past consideration doctrines can be found in cases in which the form of duress is economic rather than physical. *Tindall v. Konitz Contracting, Inc.*¹⁹¹ provides an illustration. Tindall was a general contractor, specializing in gravel crushing for roadways and runways.¹⁹² Tindall wanted to retire, and Konitz, an employee of another contractor, agreed to buy Tindall's business.¹⁹³ The two executed separate agreements with respect to the business real estate and equipment.¹⁹⁴ Both men realized that Konitz could only be successful in taking over the business if Tindall assisted him initially, at least by placing his bonding capacity at Konitz's disposal.¹⁹⁵ The sale price of some of Tindall's equipment was inflated above market value to compensate for this assistance.¹⁹⁶

Nearly two years after the initial agreements, Tindall presented Konitz with a personal services contract, reciting Tindall's performance of services on various construction projects and obligating Konitz to pay Tindall \$138,629.80.¹⁹⁷ Konitz understandably resisted executing the contract. Tindall began a series of threats to put Konitz out of business by contacting Konitz's suppliers, bankers, and bonding companies and

185. *Id.* at 642.

186. *Id.*

187. *Id.* at 641.

188. *Id.*

189. *Id.* at 642.

190. *Id.*

191. 783 P.2d 1376 (Mont. 1989).

192. *Id.* at 1378.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 1380. Initially, Konitz prepared bids for Tindall's signature, although Konitz actually performed the work. Later, Tindall and Konitz bid as a joint venture. Ultimately, Konitz was able to bid and perform contracts in his own name. *Id.* at 1378.

197. *Id.* at 1378.

by repossessing Konitz's equipment.¹⁹⁸ Konitz's business was not healthy enough at the time to sustain an economic or legal battle, and he was forced to sign the personal services contract.¹⁹⁹ When Konitz's financial situation improved, he refused to make payments under the personal services contract, and Tindall retaliated by trying to carry out the threats he had made.²⁰⁰ He also filed an action on the personal services contract.²⁰¹

The trial court found the personal services contract void for lack of consideration and, in the alternative, unenforceable because it was executed under duress.²⁰² The Supreme Court of Montana affirmed, on the grounds that past consideration was not sufficient to support the alleged contract.²⁰³ The supreme court could just as easily have chosen the duress issue as the dispositive one.

When the level of misconduct is as high as it was in *Tindall* and *Quazzo*, duress is a sufficient ground for refusing to enforce a promise.²⁰⁴ The defense of "past consideration" not only adds nothing but seems entirely beside the point.²⁰⁵

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 1379.

202. *Id.* at 1377.

203. *Id.* at 1379-80.

204. In some cases, however, the evidence of improper pressure is somewhat sketchy. See, e.g., *Newman v. Sablosky*, 407 A.2d 448 (Pa. Super. Ct. 1979) (apparent wrongful threat to abort real estate closing induces seller of medical practice to execute any covenant not to compete buyer desires). It may be that the availability of a past consideration defense in *Newman* prevented the full development of a factual record or a full judicial description of the record on issues of duress, good faith, or unconscionability.

205. Cf. *McLain v. Heard*, 291 S.E.2d 781 (Ga. Ct. App. 1982) (moral consideration case). The *McLain* case was the classic battle between creditor and widow. Shortly after her husband's death, Mrs. Heard sent Mr. McLain an unsolicited letter in which she stated that her husband's debt to McLain would be paid, although she could not say when. The letter prompted a series of statements and bills from McLain, some apparently threatening legal action. Mrs. Heard wrote McLain again, acknowledging an obligation to pay as well as his right to commence legal proceedings, but informing him that she would have no money until her home was sold. She included a \$200 payment, which she represented to be all the money she had. McLain filed suit about a year and a half later, relying on the dead husband's original note and the first letter as proof of Mrs. Heard's obligation.

The trial court held that there was no contract between Mrs. Heard and McLain, apparently on grounds of indefiniteness. Mrs. Heard's letters never actually stated the amount of the debt and did not specify a rate of interest or a time for payment. The court of appeals affirmed, shifting the rationale to lack of consideration. Mrs. Heard did not extract, as a condition of her promise, a release of McLain's claim against her husband's estate. Therefore, the transaction was not a bargain. The respect Mrs. Heard felt for her deceased husband and his intentions was mere moral consideration and insufficient.

The court of appeals decision disposes of the case neatly, but it is not materially better than the trial court's rationale. The promise in the first letter is indeed indefinite. The promise in the second letter could conceivably be construed as a promise to pay out of a definite fund (the house

In other cases, however, the evidence of duress is very weak, and the rule that past consideration is insufficient seems to pull the laboring oar. *Moorcroft State Bank v. Morel*²⁰⁶ is such a case. Morel was a rancher and the employer of a couple, Mr. and Mrs. Spain. When the Spains decided to raise livestock of their own, Morel agreed to furnish grass for their animals.²⁰⁷ The Spains borrowed \$9000 from the plaintiff bank to finance the operation and executed a note and livestock mortgage in favor of the bank in that amount.²⁰⁸ Morel was not involved in any manner in negotiating the loan with the bank, and the bank did not rely on him in extending credit to the Spains.²⁰⁹ Eight days later, the president of the bank invited Morel to his home, where he presented Morel with a proposed guaranty of the loan to the Spains.²¹⁰ Morel initially refused, explaining that he had only agreed to provide grass for the livestock, not to guarantee a loan.²¹¹ The bank president insisted that "I've got to have . . . I must have this document," and, after "considerable discussion and urging," Morel "succumbed to his argument" and signed the guaranty.²¹² After the Spains defaulted and the bank obtained default judgments against them, the bank sought recovery from Morel.²¹³ Judgment for Morel was affirmed under the traditional rule that a guaranty executed after an initial credit transaction must be supported by new consideration.²¹⁴ Since the earlier loan to the Spains could not be consideration for the guaranty, the guaranty failed for lack of consideration.²¹⁵

The *Morel* case appears to offer some comfort to the defenders of the doctrine of consideration. If the disposition of the case intuitively "feels" just,²¹⁶ it is probably because it is difficult to imagine why Morel "succumbed" and signed the loan guaranty, unless the president of the bank either deceived him or applied some form of improper pressure. The court's opinion, however, does not contain the kind of facts that would support a finding of fraud, duress, or undue influence. Thus, it is

proceeds), but the opinion suggests that the second letter was prompted by Mr. McLain's persistent nagging. Since hounding impoverished widows is still considered bad form in most circles, it is likely a more fully developed factual record would have provided a defense of unconscionable conduct or even duress to the second promise.

206. 701 P.2d 1159 (Wyo. 1985).

207. *Id.* at 1161.

208. *Id.* at 1160.

209. *Id.* at 1160-61.

210. *Id.* at 1161.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 1161-62.

216. See *infra* part III.A.4. I shall argue, *infra*, that any such intuitive "feeling" is misguided.

arguable that in *Morel*, the doctrine of past consideration provided a convenient way of disposing of a suspect transaction when traditional contract defenses based on promisee misbehavior were not provable.

3. UNDUE INFLUENCE

The aged, the infirm, and the aggrieved feature prominently in some of the past consideration and moral consideration cases. As promisors, they are susceptible to a variety of pressures that could serve as the basis for the defense of undue influence. One moral consideration case in which an undue influence defense was clearly viable was *Estate of Voight*.²¹⁷ The case involved a claim against Mr. Voight's estate based on two notes, each in the amount of \$13,500, executed in favor of his stepsons, Jack and Thomas Kapsa.²¹⁸ The notes were executed while Mr. Voight was visiting Jack in Chicago.²¹⁹ At the time of the visit, Mr. Voight was an alcoholic in a deteriorated physical condition.²²⁰ He was less than four months from his own death, and his wife had died six months earlier.²²¹ He was not represented by counsel, although Jack had enlisted his own attorney to draft the notes.²²² Apparently, Jack asked Mr. Voight to sign the notes because Jack's mother, Mrs. Voight, had died owing Jack and Thomas money.²²³ Mr. and Mrs. Voight, however, had kept their property, finances, and records sufficiently separated that Mr. Voight had no legal obligation to pay her separate debts.²²⁴

The trial court denied the claims on the notes on alternative grounds of lack of consideration and execution as a result of undue influence.²²⁵ The appellate court affirmed on the grounds that the notes were supported only by Mr. Voight's sense of moral duty, which was insufficient consideration.²²⁶ Clearly, the undue influence defense was also supported by the record and would have sufficed to invalidate the promises represented by the notes. Thus, the moral consideration cases illustrate, as did the cases decided under some of the other corollaries to the doctrine of consideration, that an absence of consideration can be one factor that indicates promisee misconduct in procuring a promise. In such cases, however, the misconduct itself frequently provides a

217. 624 P.2d 1022 (N.M. Ct. App. 1981).

218. *Id.* at 1023.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 1023-24, 1025.

225. *Id.* at 1023.

226. *Id.* at 1023, 1025.

defense, and a separate "rule" on moral consideration is unnecessary.²²⁷

In some of the past consideration cases, however, the misconduct by the party who benefits from a promise is neither as severe nor as obvious. In such cases the simplicity of the past consideration defense makes it at least superficially attractive. Cases involving promises made by the elderly are particularly difficult, especially if the promisor has died or become incompetent by the time of trial. *Estate of Mariotte*²²⁸ is a good example of such a difficult case. Helen Mariotte and Virginia Sigler were close friends for more than thirty years.²²⁹ Between 1949 and 1977, they both lived in Mariotte's house and shared food expenses.²³⁰ Until 1977, Sigler paid rent.²³¹ Upon Mariotte's return home from a hospital stay in 1976, her son and daughter-in-law hired another woman, Florence Zimmerman, to care for her.²³² Unlike Sigler, Zimmerman received compensation for her services in the form of room, board, and \$85 per week.²³³ Sigler continued to live in the house and helped care for Mariotte without compensation.²³⁴ She also continued to pay rent and buy food until December of 1977.²³⁵ Sigler then demanded compensation from Mariotte's son and daughter-in-law for her assistance in caring for Mariotte.²³⁶ The son and daughter-in-law refused to pay Sigler a salary but did agree to absorb her costs for food and discontinue her rent obligation.²³⁷ This arrangement continued until mid-1979, when Sigler drafted a document for Mariotte's signature.²³⁸ The document instructed "whoever is in charge of my estate" to pay Sigler at the rate of \$85 a week, plus room and board, retroactive to August 1, 1976, and to give Sigler's claim priority over other claims.²³⁹ Mariotte executed the document with an "X," and two other women, who later testified Mariotte was lucid when she signed, witnessed the signature.²⁴⁰ Mariotte's daughter-in-law and Sigler filed rival petitions for appoint-

227. See also *Rose v. Howard*, 670 S.W.2d 142 (Mo. Ct. App. 1984) (promise to assign unenforceable because supported only by "love and affection"; lower court had also sustained defenses of fraud, undue influence, and mistake).

228. 619 P.2d 1068 (Ariz. Ct. App. 1980).

229. *Id.* at 1068.

230. *Id.*

231. *Id.*

232. *Id.* at 1069.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

ment as Mariotte's guardian and conservator shortly thereafter.²⁴¹ The court heard medical testimony that Mariotte was senile, suffered from Parkinson's disease, and was mentally unable to manage her affairs.²⁴² When the court granted the daughter-in-law's petition, Sigler filed a claim for compensation based on the document signed by Mariotte.²⁴³ Denial of the claim was affirmed, based in part on the rule that "past benefits do not constitute sufficient consideration."²⁴⁴ Since all services rendered prior to December 1977 were intended, at the time, to be gratuitous, the subsequent promise to pay for services rendered between August 1976 and December 1977 was not supported by consideration.²⁴⁵

The *Mariotte* case looks very much like a classic case of undue influence.²⁴⁶ It certainly appears that Sigler took advantage of a long-standing, confidential relationship in order to impose a disadvantageous deal upon a weakened and dependent friend. If the court had not had available the doctrine of past consideration, it could have reached the same result—on the same factual record—by sustaining the defense of undue influence. However, the substitution of undue influence for the doctrine of past consideration might not be costless in all cases. While the issue of past consideration can sometimes be decided by a court summarily, or upon minimal evidence, the issue of undue influence may not be so easily decided. In *Mariotte*, for example, while it may have been clear that Mariotte was losing her grip on reality at the time she executed the critical document, there were at least two disinterested witnesses who were prepared to testify that she had not yet lost her capacity to understand what she was doing.²⁴⁷ Establishing undue influence would thus appear to require the resolution of factual and credibility issues. While those factual issues do not appear to have lengthened the factual record in *Mariotte*, it is possible they might marginally increase the complexity of some cases.

4. THE DANGER: DECISIONS IN DISGUISE AND UNDERENFORCEMENT

The cases in which an application of one of the corollaries of the doctrine of consideration is coupled with facts suggesting promisee misconduct seem to present similar patterns regardless of the type of misconduct at issue. At one pole are cases in which the evidence of misconduct is clear and the use of consideration doctrine is obviously

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 1070.

246. See RESTATEMENT (SECOND) OF CONTRACTS § 177 (1979).

247. See *Mariotte*, 619 P.2d at 1069.

redundant. At the other pole are cases in which the evidence of misconduct is weaker or more difficult to adduce and in which one suspects that judges are using consideration doctrine as a convenient way of invalidating transactions that appear suspicious without imposing the traditional evidentiary burden associated with the misconduct defenses. Defenders of the doctrine of consideration might argue that such shortcutting produces savings in time, effort, or cost.²⁴⁸

The existence and size of any such economies are necessarily speculative.²⁴⁹ Moreover, against them must be weighed the time and effort that courts and parties now waste on the intricacies of the doctrine of consideration.²⁵⁰ More importantly, any savings in time or effort produced by shortcutting come at the expense of the familiar and more serious vices of "dressing decisions in disguise."²⁵¹ First, according to one scholar, judicial decisions based on reasons other than those stated threaten the predictability that law is supposed to foster. "Cases which look the same in terms of the factors discussed in past judgments can be foreseen as likely to incur discrepant treatment only if it is recognized that there was more to the past decisions than was discussed openly."²⁵² The loss of predictability with respect to applications of the doctrine of consideration is particularly significant. Predictability of application is an absolute prerequisite if the doctrine is to fulfill the "channeling" function that its defenders have traditionally touted as one of its principal justifications.²⁵³

Second, public justifications at odds with the real grounds of decision may make a sensible decision appear arbitrary and unfair to both

248. Alternatively, the defenders of the doctrine of consideration might argue that disposing of cases on questions of law instead of questions of fact enhances the predictability of law and that the existence of consideration is more frequently resolved as an issue of law than the presence of a misconduct-based defense. Even if one accepts the debatable premise that the disposition of questions of law is generally more predictable than the resolution of questions of fact, the answer to the argument is that the doctrine of consideration in particular is woefully unpredictable in its application, both because of its complexity and because it is used as a disguise for decisions based on other reasons. See *infra* notes 251-59, 380-462 and accompanying text.

249. In particular, the existence of such economies presumes that litigants able to obtain evidence of misconduct will refrain from doing so if there appears to be an easier way to win a case. It is not clear, however, that the availability of a defense based on consideration doctrine will channel the efforts of the parties away from development of evidence of misconduct in any significant number of cases. I have been told by an experienced (and, at the time, agitated) litigator, "You don't win cases on the law. You win them on the facts." The implication of such an attitude is clear: If there is any way to obtain evidence that the opposing party has misbehaved in any way, obtain it and find a way to use it, no matter how strong your case is on issues of law.

250. See Sharp, *supra* note 11, at 795.

251. Reiter, *supra* note 17, at 445.

252. *Id.* at 446.

253. The classic statement of the "channeling function" of legal formalities is in Fuller, *supra* note 77, at 801-03.

professional and lay critics by substituting a controversial ground of decision for a more acceptable one.²⁵⁴ Applying a corollary to the doctrine of consideration as a covert way of policing for misconduct may truncate the court's description of the misconduct in question and thereby obscure the propriety of the disposition of a case. In the cases in which a faint odor of misconduct accompanies an application of the doctrine of consideration, there is no way to tell whether stronger evidence of misconduct was simply absent or not described by the court.

Third, using consideration doctrine as a proxy for misconduct threatens to stunt the growth of the doctrines establishing and constituting the misconduct defenses.²⁵⁵ Reiter's observation that, in cases involving unfair bargaining pressure, "we have practical assistance mainly in cases which can be handled with a broadaxe and only rarely in those requiring a scalpel" is still largely true.²⁵⁶ This is harmful because well-articulated defenses of duress, deception, and undue influence are necessary even in cases in which consideration is clearly present. In *Sorrells*, for example, the apparent victims of misconduct made two imprudent agreements with respect to a tract of land.²⁵⁷ The requirement of mutuality could only relieve them from the second.²⁵⁸

Fourth, where the stated ground of a particular decision and the true ground of decision do not coincide, there is a danger that, in future cases, a decision-maker will not be able to "see through the disguise."²⁵⁹ If the correlation between the stated ground and true ground proves to be less than perfect in practice, a subsequent court faced with the presence of the stated ground may feel compelled to follow precedent when the true ground is absent and the disposition undesirable. Indeed, it is arguable that precisely that phenomenon occurred in *Morel*.²⁶⁰

Morel is one of a number of cases denying effect to a guaranty made or executed subsequent to a loan or extension of credit.²⁶¹ Some

254. Reiter, *supra* note 17, at 444, 446.

255. *Id.* at 446.

256. *Id.*

257. *Sorrells v. Bailey Cattle Co.*, 595 S.W.2d 950, 952-53 (Ark. Ct. App. 1980).

258. Fortunately for the victims, the villain ran afoul of the Statute of Frauds in both instances. *Id.* Similar ineptitude cannot be guaranteed in many cases.

259. Reiter, *supra* note 17, at 446.

260. *Moorcraft State Bank v. Morel*, 701 P.2d 1159 (Wyo. 1985) (consideration lacking for loan guaranty by debtor's employer executed eight days after loan made).

261. *Kafka v. Bellevue Corp.*, 999 F.2d 1117 (7th Cir. 1993); *In Re Adams Lab., Inc.*, 3 B.R. 503 (Bankr. E.D. Va. 1980); *Management Recruiters of Atlanta North, Inc. v. J & B Smith Co.*, 362 S.E.2d 462 (Ga. Ct. App. 1987); *Zagoria v. Dubose Enter.*, 296 S.E.2d 353 (Ga. Ct. App. 1982); *McLain v. Heard*, 291 S.E.2d 781 (Ga. Ct. App. 1982); *City Nat'l Bank of Hoopeston v. Russell*, 615 N.E.2d 1308 (Ill. App. Ct. 1993); *H. Watson Dev. Co. v. Bank & Trust Co. of Arlington Heights*, 374 N.E.2d 767 (Ill. App. Ct. 1978); *Merchants Nat'l Bank and Trust Co. v. Lewark*, 503 N.E.2d 415 (Ind. Ct. App. 1987); *Taylor's Auto Parts v. Mayo*, 807 S.W.2d 215 (Mo.

of them seem intuitively satisfactory. I suggest, however, that such intuitions are explained not by any intuitive appeal of the principle that "past consideration is no consideration" but by a mental picture conjured up by the identity of the subsequent guarantors in many of the cases. Specifically, many of the subsequent guarantors turn out to be individual principals of a business²⁶² or relatives of the original obligor.²⁶³ Subsequent guaranties by such individuals raise peculiar difficulties. These difficulties may be illustrated by the following hypothetical.

Suppose Sherlock Holmes incorporates the Baker Street Detective Agency and obtains a start-up loan from LeStrade the Lender to finance the acquisition of laboratory equipment and other tools of the trade. LeStrade makes an unsecured loan to Baker Street, the terms of which require periodic payments. Six months later, Baker Street is current in its payments, but the general business climate is shaky and Baker Street's revenues are not meeting expectations. LeStrade is nervous and seeks security. First, he obtains a personal guaranty of the Baker Street loan from Sherlock Holmes. Second, LeStrade obtains similar guaranties from Sherlock's brother, Mycroft Holmes, and his dear friend, Dr. Watson, neither of whom has any ownership interest in Baker Street. Third, LeStrade obtains a security interest in Baker Street's lab equipment. Fourth, LeStrade requests a special payment to reduce the loan balance, which he receives in the form of a Baker Street check.

If past consideration is no consideration, the guaranties from Sher-

Ct. App. 1991); *Springfield Television, Inc. v. Gary*, 628 S.W.2d 398 (Mo. Ct. App. 1982); *Martin Roofing, Inc. v. Goldstein*, 457 N.E.2d 700 (N.Y. 1983); *Tender Loving Care Agency v. Hladun*, 488 N.Y.S.2d 790 (N.Y. App. Div. 1985); *Carolina Eastern, Inc. v. Benson Agri Supply, Inc.*, 310 S.E.2d 393 (N.C. Ct. App. 1984); *Fourticq v. Fireman's Fund Ins. Co.*, 679 S.W.2d 562 (Tex. Ct. App. 1984).

262. *Ratchford v. United States Cent. Underwriters Agency*, 492 F. Supp. 137 (E.D. Mo. 1980); *Management Recruiters of Atlanta North, Inc. v. J & B Smith Co.*, 362 S.E.2d 462 (Ga. Ct. App. 1987); *Zagoria v. Dubose Enterprises, Inc.*, 296 S.E.2d 353 (Ga. Ct. App. 1982); *Soukop v. Snyder*, 709 P.2d 109 (Haw. Ct. App. 1985); *Aurora Nat'l Bank v. Martin*, 532 N.E.2d 935 (Ill. App. Ct. 1988); *Am. Nat'l Bank of Champaign v. Warner*, 468 N.E.2d 184 (Ill. App. Ct. 1984); *State ex rel. Ludwick v. Bryant*, 697 P.2d 859 (Kan. 1985); *Taylor's Auto Parts v. Mayo*, 807 S.W.2d 215 (Mo. Ct. App. 1991); *Missouri Farmers Ass'n v. Wolfe Bros. Farm, Inc.*, 681 S.W.2d 15 (Mo. Ct. App. 1984); *Springfield Television, Inc. v. Gary*, 628 S.W.2d 398 (Mo. Ct. App. 1982); *Martin Roofing, Inc. v. Goldstein*, 457 N.E.2d 700 (N.Y. 1983); *Carolina Eastern, Inc. v. Benson Agri Supply, Inc.*, 310 S.E.2d 393 (N.C. Ct. App. 1984); *Farmers Union Oil Co. v. Maixner*, 376 N.W.2d 43 (N.D. 1985); *see also Fourticq v. Fireman's Fund Ins. Co.*, 679 S.W.2d 562 (Tex. Ct. App. 1984) (former owner of business).

263. *In Re Adams Lab., Inc.*, 3 B.R. 503 (Bankr. E.D. Va. 1980); *McLain v. Heard*, 291 S.E.2d 781 (Ga. Ct. App. 1982); *Jackson v. First Bank of Clayton County*, 256 S.E.2d 923 (Ga. Ct. App. 1979); *City Nat'l Bank of Hoopeston v. Russell*, 615 N.E.2d 1308 (Ill. App. Ct. 1993); *H. Watson Dev. Co., Inc. v. Bank & Trust Co. of Arlington Heights*, 374 N.E.2d 767 (Ill. App. Ct. 1978); *Missouri Farmers Ass'n v. Wolfe Bros. Farm, Inc.*, 681 S.W.2d 15 (Mo. App. 1984); *Fafoutis v. Lyons*, 540 N.Y.S.2d 20 (N.Y. App. Div. 1989); *Tender Loving Care Agency v. Hladun*, 488 N.Y.S.2d 790 (N.Y. App. Div. 1985).

lock and Mycroft Holmes and Dr. Watson are all unenforceable. The original loan is mere past consideration, and, if Baker Street is not in default, LeStrade has no current rights against the agency, forbearance from which might constitute present consideration.²⁶⁴ Does this result make sense?

There is an argument that it does. The Holmes brothers and Watson are Victorian Englishmen and may be supposed to be rational economic actors. Executing a guaranty in favor of Baker Street is the assumption of a risk, and rational economic actors would be expected to exact a price before doing so. Since our heroes did not, we become concerned. In Sherlock's case, we fear improper pressure. Sherlock's self-image is intimately connected with his business, and he knows that LeStrade can make his life difficult even if LeStrade has no present right of action. We therefore suspect Sherlock may have capitulated to actual or implied threats.

In the case of Mycroft and Dr. Watson, we fear that the risk assumed has been undervalued, either because they became careless due to affection for Sherlock or because Sherlock has deceived or improperly pressured them. However, we cannot prove any of this. Sherlock is afraid to testify against LeStrade, and Mycroft and Watson are too loyal to testify against Sherlock. In short, we fear misconduct, but we cannot obtain the evidence needed to prove it. As a result, we are content to invalidate the guaranties on the basis of consideration doctrine.

This illustration explains the intuitive sense of satisfaction some may feel upon an initial examination of the subsequent guaranty cases. As a rationale for the past consideration corollary to the doctrine of consideration, however, it is inadequate. Its acceptance would introduce considerable incoherence into commercial law and practice for several reasons. First, the forms of carelessness or misconduct that generate concern could have been practiced at the time of the original loan. Had the guaranties been executed contemporaneously with the Baker Street loan, however, they would all have been enforceable²⁶⁵ unless Sherlock, Mycroft and Watson were able and willing to prove a traditional misconduct defense. No reason in theory or commercial practice can be given for treating subsequent guaranties differently.²⁶⁶

264. See *Town & Country Bank of Quincy v. E & D Bancshares, Inc.*, 527 N.E.2d 637 (Ill. App. Ct. 1988); *Thornton v. Ankeny State Bank*, 453 N.W.2d 240 (Iowa Ct. App. 1990).

265. The extension of credit to Baker Street would constitute consideration for any number of contemporaneous guaranties. See *Jackson v. First Bank of Clayton County*, 256 S.E.2d 923 (Ga. Ct. App. 1979); *Soukop v. Snyder*, 709 P.2d 109 (Haw. Ct. App. 1985); *Aurora Nat'l Bank v. Martin*, 532 N.E.2d 935 (Ill. App. Ct. 1988); *Am. Nat'l Bank of Champaign v. Warner*, 468 N.E.2d 184 (Ill. App. Ct. 1984).

266. Two objections might be made to the statement in the text. First, one might object that

Second, the urge to use the doctrine of past consideration as a device for policing misconduct covertly diminishes or disappears if we suppose that the subsequent guaranty is made, not by Sherlock Holmes or his friends or relatives, but by his landlady, Mrs. Hudson. Her relationship to Sherlock is purely commercial. If she signs a subsequent guaranty of Baker Street's obligations, it is probably because she is looking at the matter "relationally" and sees some long-term value to her in building good will between her tenant and LeStrade.²⁶⁷

Finally, if the subsequent guaranties are invalidated, the treatment of them is utterly inconsistent with the treatment of the security interest and the negotiable instrument. By statute, the antecedent debt of Baker Street qualifies as "value" for purposes of validating the security interest in Baker Street's laboratory equipment²⁶⁸ and the negotiable instrument

post-loan guaranties should be treated differently from guaranties contemporaneous with a loan because the latter, unlike the former, are relied upon by the lender in agreeing to extend credit to the primary obligor. See *supra* note 264. The objection seems to presuppose the empirical proposition that lenders generally regard personal guaranties as so important at the inception of a lending relationship that a failure to supply them would result in a rejection of the application for credit. I see no reason to suppose that proposition to be true in any significant number of cases. It seems more likely that, in extending credit, lenders rely most heavily on such factors as the availability of collateral, the viability of the project or business for which the loan is sought, and the capitalization of the business. Moreover, reliance on a personal guaranty by a lender seems more likely at a later stage of the lending relationship, when the factors that induced the loan initially no longer give sufficient comfort to the lender.

Second, one might object that the disbursement of loan funds (or commitment to extend credit) at the inception of the lending relationship is a significant event that causes the contemporaneous guarantor to deliberate thoroughly before making his promise. Again, however, there is reason to doubt the empirical premise of the objection. Why should it be assumed that a guarantor who makes his promise at the inception of a lending relationship (when business projections are typically favorable) will be more cautious or deliberate than a guarantor who makes his promise when business is shaky and the lender is nervous? If the answer is that the subsequent guarantor is more likely to have been deceived or pressured by the lender or the primary obligor, the misconduct-based defenses are adequate protection, just as they are for the contemporaneous guarantor.

267. Classical and neo-classical theories of contract have been criticized by relational theorists for excessive "discreteness," i.e., for isolating distinct "promises" from the context in which they occur and the ongoing relationships of which they are a part. See, e.g., Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 *FORDHAM L. REV.* 303, 308-11 (1992); Wallace K. Lightsey, *A Critique of the Promise Model of Contract*, 26 *WM. & MARY L. REV.* 45, 49-52 (1984). The classical bargain theory of consideration required not only isolation, but pairing of such discrete promises, as a necessary condition of promissory enforcement. It has been suggested that, if a relational perspective is adopted, instances of "past consideration" can be classified as beneficial exchanges worthy of enforcement. See Michael D. Bayles, *Legally Enforceable Commitments*, 4 *LAW AND PHIL.* 311, 333 (1985). Such a perspective might enable the recognition, for example, that Mrs. Hudson's execution of a guaranty of Baker Street's antecedent debt is motivated by at least a vague expectation of some as yet undefined reciprocal benefit from the lender or Baker Street and is thus not radically different in kind from a classical bargain.

268. See U.C.C. §§ 1-201(44), 9-203 (1989). The reader will, I hope, forgive the extraterritorial application of the U.C.C.

issued in partial payment.²⁶⁹ Commercial practice, and the statute that is its most successful codification, recognize the right of a creditor who desires additional security to seek and obtain new or additional collateral or partial payment unfettered by the common law doctrine of past consideration. Ironically, the common law lags behind in refusing to recognize the post-loan personal guaranty, which is arguably an inferior form of security.

Commercial law would be more coherent if post-loan personal guaranties were generally recognized in the same way that post-loan collateralization is recognized, subject to traditional defenses of fraud, duress, or undue influence. The most coherent system would apply such a rule even to business principals and their friends and relatives.²⁷⁰ Using the doctrine of past consideration as a gatekeeper to stop their guaranties can be explained (although not justified) on grounds of a vague sense of sympathy. Anyone with an extended family of any size has at least one profligate or imprudent relative whose obligations he would not wish to assume but whom it is awkward to refuse. No such sympathy explains blocking Mrs. Hudson's guaranty. If her guaranty is invalidated, Reiter's prediction has come true; a "rule" has been applied when its stated, but not its actual, ground is present. The guarantor in *Morel* was little more than Mrs. Hudson brought into the present, transformed from a landlord into an employer and moved to the country. He apparently saw a long-term business advantage in keeping his employees' lender happy by signing a personal guaranty. Unless he could prove a traditional misconduct defense, his guaranty should have been enforced.

B. *Consideration Doctrine as a Covert Way of Policing for Fairness*

The use of the corollaries to the doctrine of consideration as devices for policing misconduct thus produces effects ranging from mere redundancy to positive harm. The same is true of the somewhat less frequent use of consideration doctrine as a way to police the fairness of an agreement.

Overt appeals to the reasonableness or fairness of transactions are not frequently authorized in the law of contracts, and the express use of consideration doctrine in tandem with such an appeal is correspondingly

269. See U.C.C. § 3-303(a)(3) (1989); RESTATEMENT (SECOND) OF CONTRACTS § 88(a) (1979).

270. As the text implies, I regard this increased coherence of the law surrounding credit practices as a sufficient reason to abandon the present rule that denies enforcement of subsequent guaranties and to adopt a presumption in favor of their enforcement, subject to the traditional misconduct-based defenses. See Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273 (1992) (explaining the desirability of "local coherence").

rare. *In re Four Star Music Co., Inc.*²⁷¹ was such an exceptional situation. The plaintiff, Pippin Way, Inc., sought to lift the automatic stay imposed by the Bankruptcy Act to reclaim a music catalog Pippin Way had purchased at a private foreclosure sale conducted by a Tennessee bank.²⁷² Foreclosure sales of personal property are governed by U.C.C. § 9-504(3), which expressly subjects such sales to a requirement of commercial reasonableness.

Tennessee banks have a rather colorful reputation,²⁷³ and the *Four Star* case provides some of the raw material from which such reputations are made. The bank was experiencing financial difficulties. Its management was anxious to avoid both the perception that it was suffering losses on large loans and the accumulation in the bank's hands of large amounts of property as the result of foreclosures.²⁷⁴ When the bank was forced to declare *Four Star* in default, the officer in charge of the *Four Star* account found an innovative way to achieve the bank's goals. First, he ordered an independent appraisal of the catalog from a local attorney.²⁷⁵ When he learned that the attorney's appraisal would be low, he instructed the attorney not to reduce his findings to writing, apparently to avoid disclosure to the bank's auditors.²⁷⁶ The bank officer then prepared his own appraisal, using figures supplied by a mysterious individual identified as "John Beanstalk."²⁷⁷ The bank officer did not solicit any music industry investors who might be interested in purchasing such specialized collateral, and he even rebuffed or avoided a few of them.²⁷⁸ Instead, he sold the catalog to Pippin Way for a million dollars.²⁷⁹ Pippin Way "paid" with a million-dollar promissory note.²⁸⁰ The purchase

271. 2 B.R. 454 (Bankr. M.D. Tenn. 1979).

272. *Id.* at 456. The catalog, a collection of musical compositions and associated copyright and contract rights, had originally belonged to the bankrupt corporation, *Four Star Music, Inc.* *Four Star* had granted a security interest in the catalog to a Nashville bank. *Id.*

273. Perhaps the most significant contributors to that reputation were two brothers, Jake Butcher and C.H. Butcher, Jr. Their flamboyant antics led to the collapse of twelve banks, approximately \$700 million in losses to the Federal Deposit Insurance Corporation, and a twenty-year prison sentence for Jake Butcher. See Stan Crock, *Washington Turns Up the Heat on Banking a la Bert Lance*, BUS. WK., Oct. 7, 1985, at 78; Howard Kurtz, *C.H. Butcher Indicted for Defrauding Investors*, WASH. POST, Feb. 7, 1986, at B9; James Sterngold, *Tennessee Banker is Given 20-Year Jail Term*, N.Y. TIMES, June 4, 1985, at A1; *A Prison Term for Jake Butcher*, BUS. WK., June 17, 1985, at 44; *Laying Bare the Risks of Diversified Banking*, BUS. WK., Mar. 7, 1983, at 29.

274. 2 B.R. at 457.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 457-58. The bank did not request a down payment or a personal endorsement by Pippin Way's President and sole shareholder.

and sale agreement gave Pippin Way an absolute right to rescind the transaction at any time within one year of sale.²⁸¹ Pippin Way neither investigated the liens against the catalog nor received an appraisal of it.²⁸² The bank never requested financial statements from Pippin Way's sole shareholder or proof of corporate authorization for the purchase.²⁸³ At the time of the sale, Pippin Way had just been (hastily) organized and was not really authorized to transact business under Tennessee law, since its minimum capital had not been paid in.²⁸⁴ Pippin Way never made any payments on the million-dollar note and never furnished operating statements to the bank, even though the bank made subsequent six-figure loans to Pippin Way.²⁸⁵ Needless to say, such a transaction does not reflect the manner in which country music catalogs are customarily sold.²⁸⁶

The bankruptcy court denied Pippin Way's motion to reclaim the catalog.²⁸⁷ The court first held that the transaction did not amount to a sale.²⁸⁸ The presence in the agreement of an absolute right to rescind the transaction made Pippin Way's commitment illusory. Pippin Way therefore supplied no consideration for the conveyance of the catalog.²⁸⁹ As an alternate ground of its decision, the court assumed that the transaction was a sale and held it to be a commercially unreasonable disposition of collateral under the Uniform Commercial Code.²⁹⁰ Although a good faith purchaser for value will normally take free of the debtor's interest and security interests subordinate to that of the foreclosing creditor notwithstanding the commercial unreasonableness of the disposition,²⁹¹ Pippin Way failed to qualify as a good faith purchaser.²⁹²

One notable aspect of the court's opinion is the relative simplicity of the first ground of its decision and the relative complexity of the second. To find an absence of consideration, the court needed little more factual support than the provision of the purchase and sale agreement that gave Pippin Way an absolute right to rescind the transaction. The finding that the "sale" was a commercially unreasonable disposition of collateral, in contrast, required investigation and use of all the messy

281. *Id.* at 458.

282. *Id.*

283. *Id.*

284. *Id.* at 459.

285. *Id.* at 458.

286. *Id.*

287. *Id.* at 465.

288. *Id.* at 459-60.

289. *Id.* at 460.

290. *Id.* at 461-64. Using Tennessee's version of U.C.C. § 9-504(3).

291. U.C.C. § 9-504(4) (1989).

292. 2 B.R. at 464.

facts recited above. The availability of the relatively simple "illusory promise" defense did not actually shorten the record in *Four Star*. Nevertheless, it is possible to understand why courts might be drawn to the doctrine of consideration and its corollary rules concerning illusory promises as a short-cut²⁹³ or as a covert way of policing transactions for fairness in situations in which no direct authorization for an appeal to commercial reasonableness is expressly invited.

There are recurring situations, however, in which the apparent simplicity of illusory promise analysis is a vice, not a virtue. An example of such a case is provided by *Commercial Movie Rental, Inc. v. Larry Eagle, Inc.*²⁹⁴ The plaintiff, Commercial Movie Rental, Inc., supplied videotape cassettes and recorders to rental outlets.²⁹⁵ The defendant, Larry Eagle, Inc., operated a small chain of convenience stores.²⁹⁶ Commercial and Eagle entered into an agreement that obligated Commercial to supply Eagle with videotapes and recorders and to train Eagle's employees in the movie rental business. In return, Eagle was to pay Commercial one half of its weekly rental revenue.²⁹⁷

One remedial clause of the agreement gave Eagle a choice of two obligations if Eagle terminated or failed to renew the contract.²⁹⁸ Eagle either had to refrain from renting videocassettes and recorders for eighteen months, or it had to pay Commercial \$650 per month for the privilege of competing in that business.²⁹⁹ In addition, the contract contained a clause exculpating Commercial from liability for "damages of any kind, whether on account of the loss . . . of present or prospective profits, or anticipated sales, expenditures, investments, or commitments made in connection with this agreement, *or on account of any other*

293. There are two cases in the relevant time period in which courts found the notion of an illusory promise a convenient tool with which to upset transactions that apparently would have defeated the legitimate claims of an ex-spouse. See *O'Neill v. DeLaney*, 415 N.E.2d 1260 (Ill. App. Ct. 1980) (alleged sale of Rubens painting to close friend for a miniscule fraction of its worth); *Estate of Haggerty*, 805 P.2d 1338 (Mont. 1990) (attempt to recharacterize inter vivos gifts by decedent as loans). In each case, the court was apparently spared the more searching inquiry necessary to establish fraud, fraudulent conveyance, or similar theories, although more evidence may have been before the court than is described in the opinion.

For a case in which the doctrine of unconscionability likely could have been substituted for an application of the doctrine of past consideration, see *Sager v. Basham*, 401 S.E.2d 676 (Va. 1991) (after accused felon for whom bail bondsman has posted \$50,000 bond failed to appear and bondsman obtained "surety's capias" authorizing arrest of accused, bondsman obtained signature of accused's mother on promissory note for \$90,000).

294. 738 F. Supp. 227 (W.D. Mich. 1989).

295. *Id.* at 228.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

event or cause whatsoever."³⁰⁰

Both parties performed for two years under the agreement.³⁰¹ After an apparent misunderstanding in which one of Eagle's stores was understocked, Eagle found another videocassette supplier and resumed its rental business.³⁰² Commercial brought suit to recover the monthly liquidated damages specified in the contract.³⁰³ The court granted summary judgment in favor of Eagle.³⁰⁴ The court insisted on reading the exculpatory clause as a total exemption from any liability for breach of any kind.³⁰⁵ This made Commercial's obligations under the agreement illusory and in turn deprived the agreement of mutuality of obligation.³⁰⁶ The agreement, accordingly, was held unenforceable for lack of consideration, and Commercial could not recover the liquidated damages.³⁰⁷

Now it may be that the court reached a proper disposition of the case. If so, it almost certainly did so for the wrong reason. Disposing of the case on grounds of lack of consideration may have been elegant and tidy, but the assertion that the Commercial/Eagle agreement was radically different from an ordinary bargain is ludicrous. It was a perfectly ordinary ongoing business deal. The parties performed their duties under it and split the profits from it for two years. The problem with the agreement was not that it failed to qualify as a "deal" or an exchange, but that it may have been so unfair or harsh to Eagle that relief from certain aspects of the agreement was necessary. Certainly, it is tempting to conclude that any agreement that absolutely deprives one party of any remedy for breach is unconscionable as a matter of law.³⁰⁸ Thus, if the court was correct in its interpretation of the exculpatory clause as a total liability exemption, a finding of unconscionability might well be in order.

Apart from the question of whether the exculpatory clause could have been given a limiting construction, however, the liquidated damages clause is problematic. Even assuming the exculpatory clause could be narrowed by interpretation, Commercial was free to walk away from the agreement with limited liability. Eagle, on the other hand, had to

300. *Id.* (emphasis added).

301. *Id.* at 229.

302. *Id.*

303. *Id.*

304. *Id.* at 231.

305. *Id.* at 230. Commercial had contended unsuccessfully that the exculpatory clause in the contract was not a complete exemption from all liability but only a disclaimer of damages for lost profits in the event video rental income did not meet the expectations of the retailer. *Id.* at 229.

306. *Id.* at 230-31.

307. *Id.* at 231.

308. See, e.g., U.C.C. § 2-719 cmt. 1 (1989) (imposing, in the case of contracts for the sale of goods, a requirement that there be "at least a fair quantum of remedy for breach").

pay for the privilege of staying in the same business if it changed suppliers. Such a bargain may be sufficiently one-sided to be unconscionable, or it may just reflect a fair price for Commercial's technical expertise or good will. However, a final determination that it was unconscionable would have required the court to examine a number of issues, including the relative sophistication and bargaining power of the parties, the circumstances under which the agreement was negotiated, whether the non-competition/liquidated damages provision could be justified by Commercial's provision of training services or confidential information or by its building of good will, and any of the numerous factors that are relevant to a determination of unconscionability. Inquiry into such issues is, to be sure, messier and more complicated than dismissing a case on grounds of lack of consideration.

In *Commercial Movie*, however, the fairness of the agreement was the real issue.³⁰⁹ By expressly declining to address the issue of unconscionability and deciding the case on the basis of the "illusory promise" corollary to the doctrine of consideration, the court dispensed with all the factual inquiries that might have revealed whether or not the deal was fair enough to enforce. In short, the doctrine of consideration made a difficult case look easier than it really was and provided no guarantee that the disposition of the case was the same as would have been reached upon a full inquiry into the real questions at issue.³¹⁰ It may be granted

309. See also *Fenberg v. Goggin*, 800 S.W.2d 132 (Mo. Ct. App. 1990) (suggesting one-sided contract is invalid because plaintiff's commitment is illusory, but allowing recovery in quantum meruit for fair value of labor).

310. Nor is *Commercial Movie* the only case of its kind. A similar artificial narrowing of the issues through the use of the doctrine of consideration occurred in *Robert L. Haag, Inc. v. Swift & Co.*, 530 F. Supp. 515 (S.D.N.Y.), *rev'd*, 696 F.2d 30 (2d Cir. 1982). Haag, a marketing firm, entered into an agreement with Swift, a major food product manufacturer, that gave Swift the exclusive right to participate in Haag's marketing program in the "processed meats" category. *Id.* at 516. In return, Haag received a monthly fee. *Id.* The agreement provided for Swift's participation in the program in an initial test area and subsequent expansion into a second area. *Id.* Either party had the privilege of terminating the agreement on ninety days notice, except that Swift's termination right was not effective until Swift had participated in the program in the second (expanded) area for twelve months. *Id.* Finally, the agreement provided that neither party could recover damages from the other for breach, except that Haag could recover its monthly fees. *Id.* When Swift terminated prior to expansion of the program into the second market, Haag sued to recover its monthly fees. *Id.* The district court held that Haag's obligations were illusory and that the agreement failed for lack of mutuality of obligation. *Id.* The Second Circuit reversed, finding that Haag provided consideration by giving Swift the exclusive right to participate in the processed meats portion of the program. *Robert L. Haag, Inc. v. Swift & Co.*, 696 F.2d 30, 32 (2d Cir. 1982). Both the trial court and the appellate court were thus distracted by the consideration issue, which offered the lower court the possibility of a speedy and simple disposition. Once again, however, the transaction at issue was clearly a business deal not significantly different from a more conventional bargain, and it was performed for more than two years. The real question should have been whether a provision that clearly deprived one party of any damage remedy is unconscionable. While it is initially plausible to suppose any such provision should be

that proof of unconscionability is often difficult. But among businesses with no apparent disparity in bargaining power, it usually should be.

If the "simplification" made possible by the doctrine of consideration is oversimplification, the use of consideration doctrine as a covert device for policing transactions for fairness is also just another way of "dressing decisions in disguise." Accordingly, it is subject to Reiter's catalog of vices.³¹¹ Indeed, although Llewellyn recognized that consideration doctrine was, in fact, used to police for fairness, he demonstrated that it is more ill-adapted than most doctrines to serve that function.³¹² The core of the problem is that the doctrine of consideration itself counsels that fairness of a transaction is irrelevant.³¹³ Anyone who does research on contract law wishes she had a quarter for every time she heard, "A court will not examine the adequacy of consideration."³¹⁴ As a guide to a lawyer in her role as counselor, therefore, consideration doctrine presents a dual threat.³¹⁵ If the lawyer actually structures transactions on the theory that fairness is irrelevant, she will find those transactions upset occasionally, randomly, and unpredictably.³¹⁶ If, on the

unconscionable as a matter of law, the fact that Swift, a food industry giant with no lack of bargaining power, agreed to such a provision should lead to some hesitation in deciding the issue in a summary fashion. Because of its focus on the consideration issue, however, the district court did not analyze the circumstances under which the provision was negotiated or the business justifications that might be given for it.

311. See *supra* notes 249-257 and accompanying text.

312. See Llewellyn, *supra* note 140, at 865-66.

313. See *id.* at 866.

314. See RESTATEMENT (SECOND) OF CONTRACTS § 79(b) cmt. c (1979).

315. See Llewellyn, *supra* note 140, at 866.

316. See *id.* Indeed, courts have occasionally misapplied the doctrine of consideration to reach a result regarded as fair. See, e.g., *Joneil Fifth Ave. Ltd. v. Ebeling & Reuss Co.*, 458 F. Supp. 1197 (S.D.N.Y. 1978). A wholesaler (Ebeling) was the exclusive distributor for a planned series of sixteen collectible porcelain figurines. A retailer (Joneil) placed an order for 600 of the first figurine in the series and received a confirmation form providing that deliveries would be "based on availability" and that allocation of merchandise might be necessary. Due to a computer malfunction, Ebeling accepted more orders than there were figurines and sought to allocate its supply among various customers. Joneil was offered 300 figurines, but the parties could not reach agreement. Ultimately, Ebeling refused to sell Joneil any of the figurines. Joneil brought suit seeking damages, specific performance, and a preliminary injunction against disposition of the figurines. Joneil sought relief not only for the original order of 600 figurines, but also for 600 of each of the remaining fifteen figurines in the contemplated series. Joneil contended (and Ebeling apparently conceded) that, under customs prevailing in the trade, an order for the first in such a series generated an option for the same quantity of each subsequent item in the series. Accordingly, Joneil's damage claim grew to \$8.8 million. The court denied the motion for a preliminary injunction, suggesting, in the process, that the options on future figurines might be unenforceable. The options appeared to the court to lack mutuality since they were "one way" (the buyer was permitted, but not required, to buy the subsequent figurines). Thus, on the record before the court, it appeared both parties were not bound, and therefore, neither could be bound.

The court's reasoning is absolutely baffling. All options, by definition, are "one way," in the sense that the optionee may, but need not, exercise the option. That fact does not cause them to violate the rules on consideration. Moreover, since the same consideration can support any

other hand, the lawyer assumes that fairness is relevant, she will encounter an opposite but equally dangerous risk. The orthodox doctrine that courts do not examine the adequacy of consideration actually makes fairness irrelevant when the doctrine is in the hands of less activist judges.³¹⁷ Use of the doctrine of consideration to police for fairness thus contains a special built-in form of incoherence.

C. *Consideration Doctrine and Disguised Policy Judgments*

There is a further class of cases in which the use of the corollaries to the doctrine of consideration appears pretextual. In this type of case, it appears the courts are using consideration doctrine as a covert way of making a policy judgment without having to support it explicitly.

Some of the best examples of such pretextual use of a corollary to the doctrine of consideration have come from the lower appellate courts of New York. In these cases, the courts employed the doctrine of mutuality of obligation to invalidate arbitration clauses that effectively compelled one party to arbitrate any disputes but left the other free to choose litigation or arbitration.³¹⁸ This use of the requirement of mutuality was ultimately unmasked in *Sablosky v. Edward S. Gordon Co.*³¹⁹ Sablosky was a real estate salesman employed by a large real estate brokerage firm (Gordon).³²⁰ Upon his termination, Sablosky claimed that he had sold a building and earned a commission of \$3.6 million.³²¹ The employment agreement upon which Sablosky sued contained an arbitration clause that made arbitration mandatory for Sablosky but optional for Gordon.³²² At the trial court level, Gordon obtained an order compel-

number of return promises, it is not clear why the initial order of figurines and the buyer's promise to pay for it could not serve as consideration, not only for the seller's initial delivery obligation, but for the option on future figurines as well. The court's misapplication of the requirement of mutuality is probably explainable as the product of a desire to avoid giving extraordinary relief to a buyer who refused an apparently reasonable (and contractually permissible) allocation and tried to turn a computer glitch into an eight million dollar bonanza. See also *Am. Medical Int'l, Inc. v. Scheller*, 462 So. 2d 1 (Fla. 4th DCA 1984) (misapplication of the doctrine of mutuality of obligation to reach fair interpretation of contract).

317. See Llewellyn, *supra* note 140, at 866.

318. See, e.g., *Wolfman v. Herbstritt*, 495 N.Y.S.2d 220 (N.Y. App. Div. 1985); *Cored Panels, Inc. v. Meinhard Commercial Corp.*, 420 N.Y.S.2d 731 (N.Y. App. Div. 1979); *Regeant of Shelby, Inc. v. Leumas Knitting Mills, Inc.*, 387 N.Y.S.2d 843 (N.Y. App. Div. 1976); see also *Hull v. Norcom, Inc.*, 750 F.2d 1547 (11th Cir. 1985) (applying New York law); *Stevens/Leinweber/Sullens, Inc. v. Holm Dev. and Management, Inc.*, 795 P.2d 1308 (Ariz. Ct. App. 1990) (applying Arizona law); *R.W. Roberts Constr. Co. v. St. Johns River Water Management Dist.*, 423 So. 2d 630 (Fla. 5th DCA 1982) (applying Florida law).

319. 526 N.Y.S.2d 820 (N.Y. App. Div. 1988), *rev'd*, 535 N.E.2d 643 (N.Y. 1989).

320. *Id.* at 821.

321. *Id.*

322. *Id.* Though the employment agreement had been terminated by mutual agreement, the

ling arbitration of the commission dispute.³²³ The appellate division reversed, specifically holding the arbitration clause to be unenforceable on the grounds that it lacked mutuality of obligation.³²⁴

The court of appeals reversed the appellate division and reinstated the order compelling arbitration.³²⁵ Initially, the court of appeals contributed greatly to the clarification of the issue by recharacterizing the requirement imposed by the appellate division as a requirement of mutuality of *remedy*, rather than a requirement of mutuality of obligation.³²⁶ The court of appeals further held that the strict reciprocity that goes by the name "mutuality of remedy" was not a requirement of arbitration clauses specifically or contracts more generally.³²⁷ As long as the entire agreement was supported by some consideration, the "arbitration option" was valid, and there was no further requirement that the obligations imposed on each party be coextensive.³²⁸ The court of appeals proceeded to address the real issue in the case, an issue which had been obscured up to that point by all the talk of "mutuality." The court

plaintiff had remained a salaried employee for more than a year thereafter. At trial, he apparently contended that the original agreement had not been terminated properly. *Id.*

323. *Id.*

324. *Id.*

325. *Sablosky v. Edward S. Gordon Co.*, 535 N.E.2d 643, 645 (N.Y. 1989).

326. *Id.* at 646.

327. *Id.* In some instances, a requirement of mutuality of remedy is, in effect, derived from the requirement of mutuality of obligation by classifying the arbitration clause as a separate or "separable" agreement, requiring its own consideration. *See, e.g.,* *Stevens/Leinweber/Sullens, Inc. v. Holm Dev. and Management, Inc.*, 795 P.2d 1308 (Ariz. Ct. App. 1990); *R.W. Roberts Constr. Co. v. St. Johns River Water Management Dist.*, 423 So. 2d 630 (Fla. 5th DCA 1982). The classification of one clause of an agreement as important enough to be "separable" and to require its own symmetrical consideration is a policy judgment, which may be more or less disguised. Indeed, there are certain policy-based, highly derivative uses of the phrase "mutuality of obligation" in which it ceases to have any connection with the doctrine of consideration at all. *See, e.g.,* *Adams v. Resolution Trust Corp.*, 927 F.2d 348 (8th Cir. 1991) (allegedly offsetting claims of different ranks under federal priority scheme for liquidating insolvent thrifts lack "mutuality of obligation").

328. 538 N.Y.S.2d at 646; *see also* *Ryan v. Upchurch*, 474 F. Supp. 211 (S.D. Ind. 1979). In *Ryan*, a retail employee sued her employer (J.C. Penney) for breach of contract. The employee contended she had been promised that she would not be discharged except for cause and that the promise had been broken. The employer contended that she was terminable at will and trotted out the familiar argument that because the plaintiff was free to leave at will, a promise such as that alleged by plaintiff could not be enforced for lack of mutuality. After noting the ambiguity of the word "mutuality," the court distinguished carefully between a requirement of consideration, which it accepted, and a requirement of symmetry in the obligations of the parties, which it rejected. Since the employee had alleged sufficient consideration to support the alleged employment agreement, there was no further requirement of "mutuality of obligation." For the heresy of talking sense, the court was unceremoniously reversed by the Seventh Circuit. *Ryan v. J.C. Penney Co.*, 627 F.2d 836 (7th Cir. 1980); *cf. Simmons v. Sowela Technical Inst.*, 470 So. 2d 913 (La. Ct. App. 1985) (relationship between student and nursing school not bilateral contract where student has no legally enforceable civil obligation to continue to maintain prescribed level of achievement and abide by disciplinary regulations).

addressed the question of whether an arbitration clause mandatory for one party but optional for the other was unconscionable.³²⁹ The court found no evidence of procedural unconscionability in the form of deceptive language, high pressure tactics, or grossly unequal bargaining power.³³⁰ The arbitration provision also was not so unreasonably favorable to one party that it could be classified as substantively unconscionable, given the characteristics of the real estate brokerage business.³³¹

Sablosky and its predecessors illustrate the dangers inherent in using the doctrine of consideration as a covert way to make policy choices or decide questions of fairness. It may be that enforcing one-way arbitration clauses is always bad policy, or it may be that such clauses operate unfairly in some contexts but not in others. Mischaracterizing such questions as questions of consideration has at least two major disadvantages. First, because of the traditional gatekeeping function of the doctrine of consideration, such a mischaracterization appears to dictate an all-or-nothing approach. One-way arbitration clauses either lack mutuality, and thus are all unenforceable, or they do not lack mutuality, and thus are presumptively enforceable. The more careful, case-by-case analysis of fairness of formation and operation conducted by the court of appeals seems precluded. Second, the mischaracterization of questions of policy or fairness as questions of consideration may lead to the wrong answer. Whether one-way arbitration clauses should be enforced is a policy question. If the correct answer to that policy question is "sometimes, depending upon whether it is fair in the circumstances," a gatekeeper doctrine that says "never" is bound to mislead in a certain range of cases. Once the court of appeals recast the issue as a problem of unconscionability *in the particular context* and focused on the usual factual inquiries, the question no longer seemed particularly difficult.

A related difficulty created by using the doctrine of consideration as a pretext for a policy judgment is illustrated by a past consideration case, *Gulf Towing Co. v. STEAM TANKER, AMOCO NEW YORK*.³³² The case arose when a harbor tug, the TAMPA, sank while assisting the STEAM TANKER, AMOCO NEW YORK into port.³³³ At the time of the sinking, Enno, a local pilot, was piloting the AMOCO NEW YORK.³³⁴ Enno's negligence in piloting the AMOCO NEW YORK

329. *Sablosky*, 535 N.E.2d at 646-47.

330. *Id.* at 647.

331. *Id.*

332. 648 F.2d 242 (5th Cir. 1981).

333. *Id.* at 243.

334. *Id.*

was the cause of the unfortunate demise of the TAMPA, and, under admiralty law, such negligence was imputed to the AMOCO NEW YORK *in rem*.³³⁵ Enno was apparently no fool, for, as soon as the AMOCO NEW YORK had docked safely (and while the TAMPA was presumably still sending up bubbles), he presented the captain of the AMOCO NEW YORK with a pilotage agreement.³³⁶ The pilotage agreement contained a clause that completely exculpated Enno from any liability for his own negligence and imposed upon the AMOCO NEW YORK and her owners and operators an obligation to indemnify the pilot against any claims brought against him.³³⁷ The captain of the AMOCO NEW YORK dutifully signed the agreement without reading it, as was apparently his custom.³³⁸ When the owner and charterer of the TAMPA sued the AMOCO NEW YORK, its owner, and Enno, the owner of the AMOCO NEW YORK asserted a cross-claim against Enno.³³⁹ Enno raised the exculpatory provision of the pilotage agreement by way of defense.³⁴⁰ The district court held that the exculpatory clause was unenforceable both because it lacked consideration and because it violated public policy.³⁴¹

The United States Court of Appeals for the Fifth Circuit affirmed, embracing only the lack of consideration rationale.³⁴² The court concluded that the exculpatory clause was not part of a bargained exchange, in part because the pilotage agreement was not executed until after Enno had rendered his services.³⁴³ The court at least inclined toward the view asserted by the owner of the AMOCO NEW YORK that the document in question was a mere receipt.³⁴⁴ The court declined to rule on the public policy defense and rested its decision solely on lack of consideration.³⁴⁵ It is a good bet, however, that the court would have concluded that the exculpatory clause violated public policy, had the court addressed the issue. While it is fairly debatable whether disclaimers of negligence liability should ever be permitted, little can be said in favor of an inadvertant waiver of negligence remedies. The result in the case, therefore, likely would have been the same had the public policy question been faced directly and expressly used as the ground for the deci-

335. *Id.*

336. *Id.* at 244.

337. *Id.*

338. *Id.*

339. *Id.* at 243-44.

340. *Id.* at 244.

341. *Id.*

342. *Id.* at 245-46.

343. *Id.*

344. *Id.* at 246.

345. *Id.*

sion.³⁴⁶ The most unfortunate aspect of the court's sole reliance on consideration doctrine was that it provided less guidance for the future than it might have. Had it faced and decided the public policy issue, it would have been forced to determine whether all pilotage negligence disclaimers, or only those extracted after-the-fact from unknowing customers, were unenforceable. An important question of policy was thus postponed, probably because the doctrine of past consideration is relatively technical and easy to apply.³⁴⁷

IV. ADDITIONAL HARM CAUSED BY THE DOCTRINE OF CONSIDERATION

The cases examined above included many in which consideration doctrine was either redundant or pretextual. In many instances, the corollaries to the doctrine of consideration were ill-adapted to perform indirect functions, and they produced adverse side effects. There are also cases, however, in which consideration doctrine is not used as a covert

346. *Cf. Kastil v. Carro*, 536 N.Y.S.2d 63 (N.Y. App. Div. 1988) (alleged oral agreement by lawyer held unenforceable both because sexual services may not provide part of consideration for contract and because past consideration is no consideration).

There are a number of cases in which promises or transactions were invalidated because they were based upon "illegal consideration." Such cases are not really corollaries to the requirement of bargained exchange at all. Most involve genuine bargains, albeit bargains that a court or legislature has condemned on policy grounds. Accordingly, such cases are really just applications of the defense of illegality and thus are beyond the scope of this Article. *See Kallen v. Delug*, 203 Cal. Rptr. 879 (Cal. Ct. App. 1984) (promise by new attorney to share fee with discharged attorney in exchange for discharged attorney's agreement not to withhold client files and substitution form); *Orange County Found. for Preservation of Pub. Property v. Irvine Co.*, 188 Cal. Rptr. 552 (Cal. Ct. App. 1983) (allegedly unconstitutional settlement of frivolous claim involving payment of public funds); *Starr v. Robinson*, 351 S.E.2d 238 (Ga. Ct. App. 1986) (agreement under which attorney also provided real estate brokerage services without a license); *Douglas v. Dixie Fin. Corp.*, 228 S.E.2d 144 (Ga. Ct. App. 1976) (refinancing loan that violated state statute), *overruled by Henson v. Dixie Fin. Corp. of Ga.*, 296 S.E.2d 593 (Ga. 1982); *Harris v. Johnson*, 578 N.E.2d 1326 (Ill. App. Ct. 1991) (alleged promise by newly-elected mayor to appoint plaintiff police chief); *Hyman v. Davies*, 453 N.E.2d 336 (Ind. Ct. App. 1983) (agreement to pay for damages caused by son's crime on condition neighbors refuse to prosecute); *Barbat v. M.E. Arden Co.*, 254 N.W.2d 779 (Mich. Ct. App. 1977) (alleged brokerage agreement committing agent to act on behalf of both buyer and seller); *Otten v. Otten*, 632 S.W.2d 45 (Mo. Ct. App. 1982) (prospective agreement to reduce child support); *Kennedy v. Kennedy*, 575 S.W.2d 833 (Mo. Ct. App. 1978) (same); *Rose v. Elias*, 576 N.Y.S.2d 257 (N.Y. App. Div. 1991) (alleged promise to purchase apartment in return for "love and affection," including adulterous relationship); *Kastil v. Carro*, 536 N.Y.S.2d 63 (N.Y. App. Div. 1988) (promise of financial security for past services, including sexual relationship); *International Aircraft Sales, Inc., v. Betancourt*, 582 S.W.2d 632 (Tex. Civ. App. 1979) (note tainted by illegal smuggling transaction).

347. The doctrine of illusory promises is also occasionally used in the service of judgments of public policy. *See, e.g., Ins. Agents, Inc. v. Abel*, 338 N.W.2d 531 (Ia. Ct. App. 1983) (misapplies doctrine of illusory promises to invalidate covenant not to compete); *see also Newman v. Sablosky*, 407 A.2d 449 (Pa. Super. Ct. 1979) (invalidation of covenant not to compete because promisor agreed to it after initial agreement for sale of medical practice).

substitute for another doctrine but in which its effects are nonetheless undesirable.

A. *Use of the Doctrine of Consideration to Avoid Decision of Evidentiary Questions*

There is one somewhat subtle way in which the doctrine of past consideration has distorted the disposition of cases and created a risk of underenforcement. In some cases, a court uses the doctrine of past consideration as a surrogate for its doubts that the promise at issue was ever made. There can be no substantive harm if the court makes (or affirms) an honest credibility determination that the promise was not made³⁴⁸ and then adds that, even if it had been made, it was unenforceable because it was supported only by past consideration. In such a case, the doctrine of past consideration is merely superfluous.³⁴⁹

More disturbing are cases in which the doctrine of past consideration is used to avoid making a factual finding with regard to the making of the alleged promise, the circumstances of its making, or the presence or absence of reliance or a past benefit. Such a use of the doctrine of past consideration is particularly tempting in cases in which the promisor has died,³⁵⁰ but it is not confined to cases of dead promisors. *Tim W. Koerner & Associates, Inc. v. Aspen Labs, Inc.*³⁵¹ appears to be an instance of the pretextual use of the rule on past consideration. In that case, Aspen, a manufacturer of electrosurgical products, was acquired by Zimmer, a manufacturer of orthopedic products.³⁵² Zimmer then termi-

348. See, e.g., *Schoenfeld v. Ochsenhaut*, 452 N.Y.S.2d 173 (N.Y. Civ. Ct. 1982). In that case, a man named Alexander Ochsenhaut died alone in his apartment in Brooklyn. Two of his neighbors, Mr. and Mrs. Schoenfeld, searched for any surviving relatives but were unsuccessful. The Schoenfelds were Orthodox Jews and were advised by their rabbi that it was extremely important that Ochsenhaut, who was also Jewish, receive a proper religious burial. The Schoenfelds then engaged the services of an appropriate funeral home and became obligated to pay its charges. After the funeral, Alexander Ochsenhaut's long-lost brother Irving appeared after a thirty-seven-year absence. The Schoenfelds alleged that Irving then promised that he would pay for the funeral. Irving contended that he had only promised a donation to a local synagogue. The court found that the promise to pay for Alexander's funeral was never made. The court also held that, even if it had been made, the Schoenfelds had no legal claim against Irving. See also *Marcotte v. Harrison*, 443 A.2d 1225 (R.I. 1982) (finding maker of note lied about promise to cancel existing debt and that note lacked consideration).

349. It should be added that, if the doctrine of consideration does no harm in such cases, it likewise does no good.

350. See *Whitmire v. Watkins*, 267 S.E.2d 6 (Ga. 1980) (suit brought in 1977 to enforce promise to devise land made in 1944 allegedly in return for services performed between 1923 and 1929); *Lesnik v. Estate of Lesnik*, 403 N.E.2d 683 (Ill. App. Ct. 1980) ("moral consideration" doctrine used to avoid deciding whether decedent's alleged promise to transfer interest in land had been made).

351. 492 F. Supp. 294 (S.D. Tex. 1980).

352. *Id.* at 297.

nated Aspen's independent distributor network and replaced it with its own distribution system.³⁵³ Plaintiff Koerner had owned one of the terminated distributors. Koerner and his companies brought a variety of complicated antitrust claims against Aspen, Zimmer, and Zimmer's parent (Bristol-Myers Company), all of which were determined to be without merit on defendants' motion for summary judgment.³⁵⁴ Plaintiffs also engaged in last-minute procedural and discovery maneuvers in an attempt to avoid summary judgment, none of which impressed the court.³⁵⁵ By the time the court reached plaintiffs' pendent state law contract claims, one gets the impression the court was growing weary of the whole dispute and a trifle impatient with the plaintiffs. Among the contracts alleged by plaintiffs was an "override" agreement between Aspen and Zimmer to compensate old Aspen dealers for their past efforts.³⁵⁶ The court held that it was unenforceable because it was based on past consideration.³⁵⁷ This is simply wrong, even as a matter of consideration doctrine. If, as part of the acquisition of Aspen by Zimmer, Zimmer promised to retain or pay Aspen's old distributors and the two parties really intended to benefit the distributors, the consideration that supported the acquisition agreement supported the promise for the benefit of the distributors.³⁵⁸ The fact that Aspen's motive in extracting Zimmer's promise was gratitude for past services is either irrelevant or, if the past services imposed contractual obligations to the distributors on Aspen which had not yet been satisfied, it made the distributors creditor beneficiaries.³⁵⁹ The malleability of the doctrine of consideration has been recognized by its critics.³⁶⁰ When the doctrine is twisted to the point of misapplication to deny recovery to a vexatious plaintiff, however, one suspects that it is a pretext for a covert conclusion that the promise asserted by the plaintiff was not made. If that suspicion is correct, the familiar dangers of disguised grounds of decision are presented. In addition, because the existence of the promise is normally a question of fact, pretextual use of the doctrine of consideration is a usurpation of the function of the jury.

353. *Id.*

354. *Id.* at 297-303. The court characterized the antitrust claims as an "effort by the mere lavish use of antitrust language to transform a sow's ear fact pattern into a silk purse filled with treble damage gold." *Id.* at 303.

355. *Id.* at 297-98.

356. *Id.* at 303.

357. *Id.*

358. The distributors would be entitled to enforce the promise as third-party beneficiaries. See RESTATEMENT (SECOND) OF CONTRACTS §§ 302-304 (1979).

359. See *id.* § 302.

360. See, e.g., GILMORE, *supra* note 2, at 57-65.

B. *Distraction and Confusion in Promissory Estoppel Cases*

The doctrine of past consideration, in particular, seems to produce distortions in the application of the theory of promissory estoppel. One of the clearest illustrations of this phenomenon is *Insilco Corp. v. First National Bank of Dalton*.³⁶¹ Insilco was a corporation with its main office in Minnesota.³⁶² It supplied building materials and supplies to the Mulls in Georgia, securing the price of the materials by taking a second security deed on the Mulls' real estate.³⁶³ The real estate was encumbered by a senior security deed in favor of the First National Bank of Dalton, but the bank's loan was relatively small.³⁶⁴ After Insilco extended credit to the Mulls, Insilco sent the bank a letter notifying the bank that Insilco intended to take a second security deed on the property and requesting the bank to notify Insilco if the Mulls became seriously delinquent in their payments to the bank or if the bank intended to commence foreclosure.³⁶⁵ The bank agreed in writing to do so.³⁶⁶ When the Mulls defaulted and the bank foreclosed, however, the bank gave only the local notice by publication required by statute.³⁶⁷ Insilco received no notice of the foreclosure and took no steps to protect its interest.³⁶⁸ Insilco's rights against the Mulls were cut off by discharge in bankruptcy.³⁶⁹

Insilco filed a complaint against the bank on theories of breach of contract, promissory estoppel, and fraud.³⁷⁰ The trial court dismissed Insilco's complaint for failure to state a claim, and the Georgia Court of Appeals affirmed with respect to the contract and estoppel counts.³⁷¹ The contract count was defective, the court held, because consideration

361. 274 S.E.2d (Ga. Ct. App. 1980), *rev'd*, 283 S.E.2d 262 (Ga. 1981).

362. 274 S.E.2d at 768.

363. 283 S.E.2d at 262-63.

364. *Id.* at 262.

365. 274 S.E.2d at 768.

366. *Id.*

367. *Id.*

368. 283 S.E.2d at 263. While the opinions of the Court of Appeals of Georgia and Supreme Court of Georgia are not clear on the point, one may surmise that the bids at the foreclosure sale were at or near the rather small amount of the bank's debt, even if that amount was not reflective of the true market value of the property. If so, Insilco's lien would be cut off, in spite of the fact that the property had sufficient value to support both liens, unless Insilco could show grounds for setting aside the foreclosure sale. This rather unappetizing scenario was precisely what happened to Insilco in a factually indistinguishable case. *Miles Home Div. of Insilco Corp. v. First State Bank of Joplin*, 782 S.W.2d 798 (Mo. Ct. App. 1990). In contrast to the Court of Appeals of Georgia, however, the Missouri Court of Appeals had no difficulty in finding the bank's promise to give notice enforceable on a theory of promissory estoppel.

369. 283 S.E.2d at 263.

370. 274 S.E.2d at 768.

371. *Id.* at 768-69.

for the promise to notify was lacking.³⁷² At the time the bank's promise to notify Insilco was made, Insilco's loan to the Mulls had already been made. There was no other consideration provided to the Mulls or the bank for the bank's promise.³⁷³ By an extremely puzzling chain of reasoning the court then concluded that, because there was no contract, Insilco had no right to rely on the bank's promise.³⁷⁴ Such an inference is effectively a holding that there is no such thing as promissory estoppel, a fact that the Georgia Supreme Court recognized at once.³⁷⁵ The supreme court reversed the court of appeals as to the estoppel count, noting simply that "promissory estoppel has been adopted in Georgia."³⁷⁶ The confusion of the court of appeals, apparently generated by the doctrine of past consideration, was thus ultimately dispelled.³⁷⁷

The misapplication of the theory of promissory estoppel is somewhat surprising. While there are lingering debates about the true explanation and justification for liability based on promissory estoppel,³⁷⁸ its evolution as a straightforward exception to the "requirement" of consideration is well-known. There should no longer be any difficulty in regarding reliance and traditional consideration as alternate, and equally sufficient, bases of contractual liability.³⁷⁹ The rhetoric associated with the gatekeeping function of the doctrine of consideration, however, has not disappeared, and it is difficult to identify any other factor that would produce the bungling of the promissory estoppel theory in cases in which such rhetoric appears.

C. Complexity, Uneven Application, and Underenforcement

Although the doctrine of consideration is anything but simple and

372. *Id.* at 768.

373. *Id.*

374. *Id.*

375. 283 S.E.2d at 262-63.

376. *Id.* at 263.

377. Not all cases have a similar happy ending. *See, e.g.,* Gladstone v. McHenry Medical Group, 553 N.E.2d 1174 (Ill. App. Ct. 1990) (refusing to enforce promise to pay founding partners of medical practice 1% charge, in part because founded on past consideration of building the practice, and neglecting obvious question whether one partner relied on promise by retiring early); *see also* Carolina Eastern, Inc. v. Benson Agri Supply, Inc., 310 S.E.2d 393 (N.C. Ct. App. 1984) (past consideration rule used to deny enforcement of subsequent guaranty in spite of creditor's offer to prove reliance in forbearance from collection efforts). The disposition of *Carolina Eastern* presumably could not be corrected because North Carolina clings to the doctrine of consideration more tightly than most jurisdictions and does not yet recognize the affirmative use of promissory estoppel. *See* Home Electric Co. of Lenoir v. Hall & Underdown Heating & Air Conditioning Co., 358 S.E.2d 539 (N.C. Ct. App. 1988).

378. *See generally* Feinman, *supra* note 267; Yorio & Thel, *supra* note 5.

379. It is possible to dismiss misapplications of doctrine as simple cases of judicial stupidity. Such a minimization of erroneous decisions is not altogether wise. When judges make mistakes, those mistakes may very well be phenomena worthy of explanation.

elegant, its corollaries are often formulated with deceptive simplicity. The requirement of mutuality of obligation, for example, is sometimes formulated as the principle that both parties to a contract must be bound or neither is bound.³⁸⁰ So formulated, the principle is a gross overgeneralization. By definition, it cannot apply to unilateral contracts. It is also subject to a number of outright exceptions, including the familiar instances in which voidable promises serve as consideration for return promises.³⁸¹ The drafters of the *Restatement (Second) of Contracts* found the principle sufficiently misleading to recommend dispensing with the term "mutuality of obligation" altogether.³⁸²

Similarly, the principle that past consideration is no consideration is an overgeneralization. Exceptions have evolved over time and seem to be the subject of general agreement. As with any other promise, a promise purportedly based only on past consideration could, nonetheless, be the object of subsequent reasonable reliance and be enforceable under a theory of promissory estoppel.³⁸³ If the "past consideration" upon which a promise is allegedly based was some benefit conferred by the promisee on the promisor, the subsequent promise may be enforceable on a restitution theory, since the promise may negate any assumption that the prior benefit was conferred officiously or as a gift.³⁸⁴ There are several cases in the relevant time period in which courts strained to find ways to enforce subsequent promises to pay finder's fees to individuals who had located real property or business opportunities, with the courts sometimes manipulating restitution principles and sometimes performing other mental gymnastics.³⁸⁵ Such exceptions to the doctrine of past consideration are now relatively uncontroversial.³⁸⁶

380. See RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. f (1979).

381. See *id.* § 78, 79 cmt. f.

382. See *id.* § 79(c).

383. See *id.* § 90.

384. See *id.* § 86 cmt. b.

385. See *Worner Agency, Inc. v. Doyle*, 479 N.E.2d 468 (Ill. App. Ct. 1985) (enforcement of promise to pay finder's fee based on benefit received); see also *Sheehy v. Bodin*, 349 N.W.2d 353 (Minn. Ct. App. 1984) (promise of finder's fee enforced because, in addition to finding property, plaintiff was presently "willing to help process" project); *Roark v. Stallworth Oil and Gas, Inc.*, 813 S.W.2d 492 (Tex. 1991) (reversing summary judgment to give an opportunity to prove that fee for "originating interest" in drilling site involved present exchange of services as well). Other methods occasionally used by courts in an effort to avoid the rigors of the doctrine of past consideration include construing apparently consecutive documents as part of the same transaction, so that consideration for one supports the other as well. See *Soukop v. Snyder*, 709 P.2d 109 (Haw. Ct. App. 1985).

386. If the existence of exceptions to the rule that "past consideration is no consideration" is uncontroversial, however, the theoretical basis for the exceptions is not. *Restatement (Second) of Contracts* § 86 presumes a basis for the exceptions in the law of restitution and its goal of avoiding unjust enrichment. More recently, Michael Bayles urged a broader recognition of past benefits as a basis for enforcing commitments, in part as a consequence of sympathy with

Thus, even though the corollaries concerning illusory promises, mutuality of obligation, and past and moral consideration are still conceptualized and used as gatekeepers, past experience has revealed a number of circumstances in which it is undesirable that they be consistent gatekeepers. Still, defenders of the corollaries might argue that there is nothing unusual or wrong with a clear rule qualified by a well-defined and limited set of exceptions. The cases in the relevant time period, however, cannot be characterized as the application of clear rules with well-defined exceptions. The corollaries to the doctrine of consideration fight with their exceptions on a regular basis.³⁸⁷ An examination of the cases reveals patterns of uneven application, as well as applications of the oversimplified version of the corollary as a gatekeeper when any justification for that function is absent.

1. PAST CONSIDERATION/MORAL CONSIDERATION

One class of cases in which the doctrine of past consideration systematically yields undesirable results has already been identified. In cases involving guaranties executed subsequent to a loan, the doctrine of past consideration introduces considerable incoherence into the law governing lenders and borrowers and appears to frustrate normal business expectations. The disruptive work of the doctrine of past consideration is not, however, confined to garden-variety business cases. *Dementas v. Estate of Tallas*³⁸⁸ is one disturbing example. Jack Tallas was a wealthy, "self-made" man.³⁸⁹ For the last fourteen years of his life, he was assisted in some respects by a close friend, Peter Dementas.³⁹⁰ A little less than two months before his death, Tallas met with Dementas and dictated a memorandum to him in his native Greek.³⁹¹ In it, Tallas acknowledged his friendship with Dementas, as well as a variety of services performed by Dementas.³⁹² Tallas also acknowledged his indebted-

relational contract theory. If one stops viewing contracts as "discrete transactions," Bayles argued, the receipt of a past benefit and a current commitment can be viewed as a single interaction. Such exchanges over time may be "plus sum interactions" as easily as conventional bargains. See Bayles, *supra* note 267, at 332-33. Even more recently, Professors Yorio and Thel have suggested that the cases in which promises based on past benefits are enforced are reflections of a general judicial tendency to enforce serious, well-considered promises. The past benefit, in such cases, is important as an indication of the seriousness of the promisor's commitment. See generally Yorio & Thel, *supra* note 5.

387. See *infra* notes 387-461 and accompanying text.

388. 764 P.2d 628 (Utah Ct. App. 1988).

389. Tallas emigrated to the United States from Greece in 1914 and, over a period of almost seventy years, achieved considerable financial success as an insurance agent and landlord. *Id.* at 629.

390. *Id.*

391. *Id.*

392. *Id.* at 631.

ness to Dementas, as a result of those services, in the amount of \$50,000, and Tallas expressed his intent to change his will to leave Dementas that amount.³⁹³ Tallas kept the Greek memorandum, translated it into English and typed it himself, notarized it with his own notary seal, and gave it to Dementas three days later.³⁹⁴ Tallas died without changing his will, and Dementas filed a claim against the estate.³⁹⁵ Denial of Dementas' claim was affirmed, in part because the past services recited in the document constituted mere past consideration.³⁹⁶

It is very difficult, however, to see why Tallas's promise to pay Dementas \$50,000 should not have been enforced. There is no doubt that the promise was made; it was available in two languages in writing. The promisor was apparently a sophisticated businessman, fully capable of appreciating the serious consequences of his promise. While he was obviously near death, the trial court specifically found that the memorandum was executed free from fraud, duress, or undue influence.³⁹⁷ The promise apparently was made with sufficient deliberation and caution, as it took three days to get it in final form. Notarization by the promisor also suggests awareness of potential serious consequences and reflects an intent to be bound. Even to those who see a role for the doctrine of consideration in the performance of evidentiary, cautionary, and channeling functions,³⁹⁸ it must be perfectly obvious that any need for the doctrine was absent from the case. If Tallas wished to acknowledge that the benefits he had received were more than just casual favors and created an obligation worth \$50,000, traditional restitution principles or the implications of relational theory should be broad enough to give effect to his intention.³⁹⁹ Indeed, there are other virtually identical cases in which such promises have been enforced.⁴⁰⁰ Even the court in

393. *Id.*

394. *Id.* at 629.

395. *Id.*

396. *Id.* at 629-30, 633.

397. *Id.* at 629.

398. *See Fuller, supra* note 77.

399. *See Bayles, supra* note 267, at 332-33 (suggesting essential continuity in reasons for enforcing conventional bargains and promises based on past consideration).

400. *See, e.g., Estate of Wessels*, 561 N.E.2d 1212 (Ill. App. Ct. 1990). In *Wessels*, a daughter recovered on a written promise by her father to pay, not only for services subsequent to the date of the writing, but those rendered for the ten years preceding the execution of the document. As in *Dementas*, the promisee was able to prove not only the existence of the promise, but the fairness of the circumstances of its execution, including representation by counsel. The document recited the services rendered, acknowledged their receipt in the expectation of payment and their value, and promised to pay them out of the promisor's estate. The court enforced the promise. Oddly enough, it did so on the grounds that the recitation that the services had been received in expectation of payment showed that the father and daughter had an oral contract, supported by consideration, all along and that the subsequent document just cleared up details as to the amount,

Dementas acknowledged criticism of the harsh results produced by applications of the doctrine of past consideration.⁴⁰¹ Its sole excuse for retaining it was that the legal recognition of "mere moral" obligations would "erode to the vanishing point the necessity for finding consideration."⁴⁰² Even if the court were correct in its assertion that enforcing Tallas's promise would put an end to the doctrine of consideration, cases such as this make its demise a somewhat appealing prospect.⁴⁰³

It thus appears that the doctrine of past consideration is not only superfluous in most of the cases in which it blocks the enforcement of undesirable promises; it also blocks enforcement of promises that it would be desirable to enforce. At the very least, the courts have not fared well in distinguishing the doctrine from its supposedly uncontroversial exceptions, and a clear risk of underenforcement has been created.

2. ILLUSORY PROMISES AND NON-STANDARD REQUIREMENTS CONTRACTS

The rule that illusory promises cannot be consideration creates a similar risk of underenforcement in at least two types of cases: those involving nonstandard requirements contracts and those involving conditions precedent formulated in terms of the "satisfaction" of one of the parties. An example of the former is provided by *Propane Industrial, Inc. v. General Motors Corp.*⁴⁰⁴ The agreement at issue was a standby propane supply contract for General Motors's Fairfax assembly plant in

manner and timing of compensation. All of this was obviously a fiction used to justify recovery on restitution principles. The court conceded that the recitation of the "expectation of payment" in the post-service document was "about the only evidence on the point." Thus, its holding is tantamount to establishing a right to restitution on the basis of a subsequent, written promise to pay for a benefit which is acknowledged to be of value. The same principles would have justified recovery in *Dementas*.

401. 764 P.2d at 633.

402. *Id.* at 633 n.8.

403. Promises to pay extra compensation to employees whose service has been particularly meritorious raise similar problems. Typically, courts apply the doctrine of past consideration and reject attempts to enforce such promises without inquiring whether the past services really were of greater benefit than the parties originally contemplated or whether restitution principles should permit recovery. *See, e.g., Kelsoe v. International Wood Prods.*, 588 So. 2d 877 (Ala. 1991) (promise to transfer five percent of corporate stock to employee); *Spickelmier Indus. v. Passander*, 359 N.E.2d 563 (Ind. Ct. App. 1977) (promise by financially strapped company to pay bonus to key employees for loyalty). Again, the reasons for creating exceptions to the rule on past consideration would seem to justify enforcement of such promises. In addition, many such promises are simply adjustments to a relationship based on conventional bargain. Critics of the preexisting duty rule have argued persuasively that such adjustments should be recognized and enforced even when they do not meet traditional tests for consideration. *See, e.g., Reiter, supra* note 17, at 455-58.

404. 429 F. Supp. 214 (W.D. Mo. 1977).

Kansas City, Missouri.⁴⁰⁵ The Fairfax plant, at the time of the events in question, used natural gas as its primary source of heat.⁴⁰⁶ The local gas utility, however, was occasionally forced to interrupt gas service to the plant.⁴⁰⁷ Accordingly, GM was required to maintain a standby supply of propane fuel for use on such occasions.⁴⁰⁸ The plaintiff propane dealer ("Industrial") had been supplying GM since 1970, although GM did not buy exclusively from the plaintiff.⁴⁰⁹

The lawsuit arose out of GM's arrangements for the winter of 1973-74.⁴¹⁰ After Industrial quoted GM a "guaranteed firm" price of \$.17 per gallon on a standby supply of 500,000 gallons of propane, GM issued a purchase order for a "possible requirement" of 500,000 gallons "to be used as standby fuel" during the heating season.⁴¹¹ The purchase order, which was executed by both parties and contained an integration clause, reflected the "firm price" Industrial had quoted and provided for delivery only "as released" by GM.⁴¹² In the summer of 1973 (before any releases), Industrial sent GM a letter apparently repudiating the contract.⁴¹³ The letter informed GM that, because of fuel shortages, Industrial could only obtain propane at a cost in excess of the contract price and that Industrial would, accordingly, be "unable to fulfill our contract."⁴¹⁴ GM replied with a letter that demanded performance in accordance with the purchase order.⁴¹⁵

In September, GM issued its first "release" for a definite quantity, and Industrial refused to deliver on the grounds that the federal government was about to enact a mandatory propane allocation program and had requested voluntary compliance prior to enactment.⁴¹⁶ The program was, in fact, enacted, and GM did not qualify as a priority user under the scheme of allocation priorities.⁴¹⁷ GM, however, submitted a proposed schedule of its propane requirements to Industrial, and Industrial requested a hardship exception from federal authorities.⁴¹⁸ The federal government granted the request and directed Industrial to supply 171,000 gallons of propane to GM "on financial terms acceptable to

405. *Id.* at 216.

406. *Id.* at 215.

407. *Id.*

408. *Id.*

409. *Id.* at 216.

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.* at 217.

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.* at 217-18.

both parties.”⁴¹⁹ Without further discussion of price, Industrial delivered over 75,000 gallons and billed GM at a price of more than \$.40 per gallon. When GM would pay only the original contract price of \$.17 per gallon, Industrial sued for the difference.⁴²⁰

The court held that Industrial was entitled to recover.⁴²¹ The court initially found that the purchase order failed for lack of consideration.⁴²² Once the written contract was out of the way, the court’s work was quite easy. The shipment and acceptance of propane amounted to conduct reflecting an intent to contract with an open price term within the meaning of U.C.C. § 2-305.⁴²³ Accordingly, in the absence of an express agreement on price, the court was free to imply a “reasonable price at the time for delivery.”⁴²⁴ The price demanded by Industrial was apparently the going rate, because GM did not contest its reasonableness.⁴²⁵

The critical link in the court’s reasoning was the finding that the written purchase order, although executed by both parties, failed for lack of consideration. The court was troubled by the fact that the purchase order referred to a “possible” requirement and provided for delivery only as “released.”⁴²⁶ The final nail in the coffin, however, was that the purchase order did not require GM to buy exclusively from Industrial.⁴²⁷ GM was free to buy propane from other suppliers, as it had done the previous year. Furthermore, GM had another standby propane contract with a rival supplier for the 1973-74 season.⁴²⁸ In the court’s view, this made GM’s commitment to buy its requirements illusory,⁴²⁹ which, in turn, implied that the purchase order failed for lack of mutuality of

419. *Id.* at 218.

420. *Id.*

421. *Id.* at 222.

422. *Id.* at 218-21.

423. *Id.* at 221.

424. *Id.*

425. *Id.*

426. *Id.* at 219. The court seemed to view both the adjective “possible” and the phrase “as released” as evidence of a reservation by GM of absolute discretion whether to perform. Neither need be so interpreted. The purchase order in question was negotiated and filled in by businessmen, not lawyers, and there are obvious interpretations of both of the quoted expressions that do not make performance absolutely discretionary. The reference to a “possible” requirement may have been nothing more than an allusion to the fact that GM’s requirements were contingent upon the vagaries of the weather and consequent interruptions in the supply of natural gas. The “as released” delivery term may have reflected nothing more than a limited storage capacity for propane.

427. *Id.* at 218-21.

428. *Id.* at 216-17, 220-21.

429. The court’s opinion does not use the term “illusory promise,” but it is fairly clear that the court rested its decision on the same concept. The court noted initially that “requirement” can mean either “all needed” or only “all desired” and concluded that GM had made “no express or implied promise to purchase any propane from plaintiff.” *Id.* at 220-21.

obligation.⁴³⁰

It must be conceded that GM's negotiating position was a bit more inflexible than might be expected of a party dealing with a long-term trading partner faced with acute product shortages. It is, therefore, a bit uncomfortable to try to generate sympathy for "poor little GM." Nevertheless, the court's classification of GM's commitment as illusory and consequent invalidation of the contract are troubling for several reasons. First, given GM's needs, it is difficult to fault the way GM had arranged for its propane supply. Since GM only needed propane if and when its natural gas supply was interrupted and since such interruptions were presumably unpredictable, a fixed quantity contract was out of the question. Some form of requirements contract was necessary. Moreover, it seems likely that GM's needs might be larger than any single supplier would be willing to commit on a standby basis. The court's opinion reflects that GM had purchased propane from three suppliers the preceding year, and, both in the preceding year and during the 1973-74 heating season, GM's needs exceeded the half million gallons covered by the purchase order.⁴³¹ It therefore seems likely that multiple requirements contracts were necessary.

Multiple requirements contracts for the same commodity present the problem of allocation of the buyer's orders among suppliers. The court was right to worry about that issue. The implication of the court's classification of GM's commitment as illusory, however, is that there can be only one possible solution to the problem: A party in GM's position must draft its requirements contracts in sequence, designating a primary, secondary, and tertiary supplier. Thus, the purchase order at issue in the *Propane Industrial* case could only have been saved if it had required GM to buy the *first* half million gallons of its requirements exclusively from Industrial. At that point, a second exclusive requirements contract could be triggered without endangering the enforceability of the first. Absent exclusivity, there can be no valid requirements contract, total or partial.⁴³²

430. *Id.* at 219, 221.

431. *Id.* at 217.

432. *Id.* at 219. Ironically, the facts before the court would have supported a conclusion that such a sequential series of exclusive partial requirements contracts was precisely what the parties had intended. The previous winter, when GM had purchased propane from three suppliers, the orders to Industrial had exceeded half a million gallons, nearly double the volume ordered from both alternate suppliers combined. *Id.* at 216-17. Moreover, for the 1973-74 winter, GM's partial requirements contract with the only alternate supplier contained an escape clause, while the contract with Industrial did not. GM issued a purchase order to the alternate supplier, Enterprise Products Company, for 1,600,000 gallons at a price of \$0.15463 per gallon. However, the agreement also contained a provision allowing GM either to buy out of the purchase obligation entirely by paying \$0.035 per gallon or to delay delivery for a year by paying \$0.045 per gallon

The court's insistence on sequential exclusivity to avoid an illusory promise on one side is simply unjustified. The drafters of the Uniform Commercial Code recognized the utility of flexible business arrangements and specifically rejected the notion that requirements contracts generally lacked either "mutuality of obligation" or sufficient definiteness.⁴³³ They concluded that the limitation of good faith was enough to ensure that the party reserving flexibility was genuinely committed to the particular deal.⁴³⁴ In the case of requirements and output contracts, moreover, the drafters gave the notion of good faith even greater specificity by giving it a special gloss. Good faith, in that context, means reasonable proportionality to any stated estimate or to prior experience.⁴³⁵ In *Propane Industrial*, however, there was arguably enough prior experience to construct an enforceable obligation on the part of GM and thus to avoid a finding of lack of mutuality.⁴³⁶ Since both Industrial and the alternate supplier had been GM suppliers previously, the court could have found that good faith required that the overall proportion of orders allocated between them remain roughly constant from year to year,⁴³⁷ and that should have been enough to avoid a finding that GM's commitment was illusory. The further requirement that one of them be designated the primary supplier and the exclusive recipient of orders up to a certain level is more than the notion of good faith requires.⁴³⁸

plus freight charges. *Id.* at 217. Thus the court could have found that GM was bound to buy its first half million gallons from Industrial and the remainder of its requirements from the alternate supplier.

433. U.C.C. § 2-306 cmt. 2 (1989).

434. *Id.*

435. U.C.C. § 2-306(1).

436. The *Propane Industrial* agreement may not have been the "plain vanilla" requirements contract one normally encounters in cases involving U.C.C. § 2-306. The reasons that led the drafters to recognize simpler requirements contracts, however, apply to the *Propane Industrial* agreement as well.

437. This standard would be satisfied as long as, at the end of the heating season, the orders placed with Industrial and the alternate supplier were in roughly the same ratio as the previous season. GM could, however, alternate ordering from Industrial and the alternate supplier in any sequence and would not be required to order all quantities up to a stated maximum from a single supplier before placing any orders with the other.

438. The analysis in the text should not be understood to imply that all nonexclusive partial requirements contracts will be enforceable. Where prior dealings or other factual bases for giving content to the notion of good faith are absent, such an agreement might fail for indefiniteness. See, e.g., *Billings Cottonseed, Inc. v. Albany Oil Mill, Inc.*, 328 S.E.2d 426 (Ga. Ct. App. 1985). The contract at issue provided that the buyer (Billings) would purchase from the seller (Albany) cottonseed "sufficient to meet all reasonable requirements" at a price "to be mutually determined from time to time by the parties." *Id.* at 428. The agreement had been in effect for only three months when a dispute arose. In the subsequent action, the court held the agreement unenforceable. The court devoted most of its opinion to an argument that the absence of a commitment to buy exclusively from Albany made Billings's commitment a mere promise to purchase when it wanted to do so and therefore deprived the agreement of mutuality of obligation.

Finally, and most importantly, the court's erroneous conclusion that GM's commitment was illusory and its consequent invalidation of the agreement for lack of mutuality kept it from seeing the issues which should have been the battleground of the case. The problem with the Industrial/GM contract was not that it was not a genuine exchange from the outset. The real problem was that the exchange had become so disadvantageous to Industrial. Because of product shortages and cost increases, performance had become much more onerous than Industrial had initially contemplated. Accordingly, at least for the period before federal allocation regulations went into effect, the court should have analyzed the case under U.C.C. § 2-615 and determined whether or not increased costs had made Industrial's performance commercially impracticable. Arguments could presumably have been mustered on both sides of that question.⁴³⁹ Later, when the federal allocation program was enacted, the court should have analyzed the extent to which the federal rationing scheme preempted the pricing provisions of existing contracts; any price implications of the regulations; and, in the absence of any specific price implications of the federal scheme, the effect of the prior Industrial/GM agreement on post-regulatory transactions with an open price term. The court's use of the "illusory promise" corollary to the doctrine of consideration not only led it to the erroneous conclusion that the original agreement was unenforceable but also

However, the court also found that the parties had not intended to be bound in the absence of an agreement on price on each occasion. Therefore, the agreement also failed under U.C.C. § 2-305(4).

The result reached in *Billings* could be questioned, particularly since the use of the phrase "reasonable requirements" extends an open invitation to a court to imply a quantity term using some objective standard. But given the extremely brief experience of the parties and the absence of any factual record indicating a usage of trade, it may have been impossible for the court to find a basis for implying how much cottonseed *Billings* was obligated to buy. Moreover, the failure to agree on a price made the court's task even more difficult. If the result in *Billings* is correct, however, it is because the agreement at issue was indefinite. The whole discussion of mutuality of obligation and consideration was superfluous. *See also* *De los Santos v. Great W. Sugar Co.*, 348 N.W.2d 842 (Neb. 1984) (nonexclusive hauling contract requiring trucker to haul "such tonnage of beets as may be loaded by the Company" held lacking in mutuality; no course of dealing supported plaintiff trucker's claim of right to haul greater quantities than allocated by defendant).

439. On the one hand, the drafters of the Uniform Commercial Code recognized that mere cost increases do not justify relief from performance obligations on ground of commercial impracticability, because the risk of price fluctuation is exactly what fixed price contracts are normally intended to allocate. *See* U.C.C. § 2-615 cmt. 4. Indeed, in the case under discussion, the plaintiff supplier had quoted a "guaranteed firm" price, and the purchase order executed by both parties expressly referred to a "firm price." *Propane Indus., Inc. v. Gen. Motors Corp.*, 429 F. Supp. 214, 216 (W.D. Mo. 1977). On the other hand, the drafters also recognized as a ground for relief "a severe shortage" due to various listed contingencies. It may very well be that, given the appropriate opportunity, Industrial could have made a case for relief under § 2-615. *See* U.C.C. § 2-615 cmt. 4. The court's disposition of the case on the basis of the doctrine of consideration prevented a full development of the relevant factual support for both sides of the argument.

obscured the truly dispositive issues and, in all probability, prevented the development of an adequate factual record.⁴⁴⁰

3. ILLUSORY PROMISES AND SATISFACTION CLAUSES

The application of the doctrine of illusory promises to a contractual obligation defined in terms of the satisfaction of one of the parties can lead to equally unacceptable results. An example is provided by *Stone Mountain Properties, Ltd. v. Helmer*.⁴⁴¹ The contract at issue was an ordinary contract for the sale of land by a limited partnership (Stone Mountain) to an individual (Mitchell).⁴⁴² The land in question was apparently commercial property, and the only even mildly unusual aspect of the transaction was a "special stipulation" subjecting the sale to a condition precedent.⁴⁴³ Specifically, the sale was contingent on Mitchell's ability to obtain approval from the Seaboard Airline Railroad to run a spur line to the property "at a location satisfactory to the purchaser."⁴⁴⁴ Mitchell had ninety days to secure such approval and notify the seller of the satisfaction of the condition.⁴⁴⁵

Seventy days later, Mitchell had made no formal application to the railroad, and Stone Mountain's general partner was apparently nervous.⁴⁴⁶ Another potential purchaser had offered to buy the same property, and the general partner was afraid Mitchell no longer had time to obtain railroad approval for a spur line.⁴⁴⁷ The new potential purchaser's offer had an extremely short deadline, and the general partner sold the land to Mitchell's rival without informing Mitchell.⁴⁴⁸ Nine days later, still within the 90-day period specified in the Mitchell/Stone Mountain contract, Mitchell obtained a plat of a spur line, which his agent informed him would be acceptable to the railroad.⁴⁴⁹ Mitchell notified Stone Mountain in writing that the condition precedent stated in the contract had been satisfied and that he was ready to perform.⁴⁵⁰ Stone Mountain mailed a response purporting to declare the agreement "null and void" and directing Mitchell's real estate agent to return his

440. Cf. *Gull Lab. v. Diagnostic Technology, Inc.*, 695 F. Supp. 1151 (D. Utah 1988) (invalidating apparently ordinary requirements contract and licensing agreement on ground that failure to state minimum quantity made buyer's promise illusory).

441. 229 S.E.2d 779 (Ga. Ct. App. 1976).

442. *Id.* at 781.

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.* at 781-82.

449. *Id.* at 782.

450. *Id.*

earnest money.⁴⁵¹

Both Mitchell and his real estate agent sued Stone Mountain and all of its partners individually.⁴⁵² The trial court ruled in favor of plaintiffs on summary judgment, but the appellate court reversed.⁴⁵³ The court held that the agreement was, from its inception, void for lack of mutuality of obligation.⁴⁵⁴ The condition defined in terms of the satisfaction of the buyer made the agreement "contingent upon an event that may or may not happen at the pleasure of the buyer."⁴⁵⁵ The illusory nature of Mitchell's commitment deprived the agreement of mutuality of obligation,⁴⁵⁶ and Stone Mountain's promise to sell was, at that point, a mere unaccepted offer to sell.⁴⁵⁷ Ironically, Mitchell's subsequent declaration of his satisfaction with the location of the spur line would normally have removed the condition from the ambit of his discretion and thereby would have restored mutuality of obligation to the agreement.⁴⁵⁸ There was, however, evidence of record that Mitchell had received word that the property had been sold prior to his declaration of satisfaction.⁴⁵⁹ While a remand was necessary to take further evidence upon the issue, the court was clear that, if Mitchell's knowledge of the sale to the rival purchaser preceded his declaration of satisfaction, Stone Mountain's offer to sell had been properly revoked while it was unsupported by consideration.⁴⁶⁰

The disposition of the case appears extremely difficult to justify for several reasons. First, the condition precedent defined in terms of Mitchell's satisfaction was arguably a reasonable business arrangement, given his apparent needs. It must be assumed that a spur line was necessary to make the property desirable for commercial uses. Given the variety of potential commercial uses, as well as the variety of engineering variables and the unpredictability of negotiations with the railroad, it is obvious Mitchell could not define the condition in terms of a specific location. At the time of the agreement, he presumably could not know where he wanted the spur line. Moreover, if engineering work was required to ascertain the desirable and feasible locations, Mitchell may not have thought it worth investing the time and money to find out where he wanted the line until after he had the agreement in hand. Thus,

451. *Id.*

452. *Id.*

453. *Id.* at 782, 785.

454. *Id.* at 782-83.

455. *Id.* at 782-83, 784.

456. *Id.* at 783.

457. *Id.* at 784.

458. *Id.* at 783-85.

459. *Id.* at 785.

460. *Id.*

there is a perfectly reasonable business explanation for the use of a condition precedent defined in terms of Mitchell's satisfaction.⁴⁶¹

Moreover, the court's conclusion that a satisfaction clause amounts to the reservation of absolutely unfettered discretion whether to perform is simply mistaken. At the very least, such a clause can be interpreted to require subjective good faith, resulting in a breach if the party whose satisfaction is critical refuses to proceed when he is, in fact, satisfied. The court concluded that a subjective interpretation of a satisfaction clause entails that the purchaser is the "sole judge" of his own satisfaction and thus may perform or refuse to perform at will. But even if the condition defined in terms of Mitchell's satisfaction with the spur line location meant what would in fact meet with Mitchell's approval, rather than what a reasonable person would approve, evidence regarding what a reasonable person would accept would certainly have been relevant had Mitchell denied he was satisfied. Thus, while a person can lie or tell the truth about whether a satisfaction clause has been fulfilled, it is possible to muster evidence that he is lying. Determining which he is doing is not different from the ordinary credibility determinations concerning mental states that triers of fact are asked to make all the time in a variety of areas of law. In short, a promise subject to a condition defined in terms of one party's satisfaction is enough of a commitment that it is possible to define and ascertain when it has been breached. If, as suggested above, there are business reasons to include such conditions in contracts, it seems senseless to classify them as illusory and invalidate

461. Mitchell could have "tied up" the property long enough for engineering work or studies through the use of an option. Options defined in terms of the satisfaction of one party have also run afoul of the doctrine of consideration, however. See, e.g., *Culbertson v. Brodsky*, 788 S.W. 2d 156 (Tex. Ct. App. 1990). In *Culbertson*, a landowner granted a prospective purchaser a sixty-day option in return for the purchaser's delivery of a \$5000 earnest money check to a title company. The title company was required to hold the check in escrow while the prospective purchaser conducted feasibility and engineering studies. If, during the sixty-day period, the purchaser found the property unacceptable, he could terminate the agreement and demand return of the earnest money check. Although the appellate court recognized the possibility of a valid contract containing a promise conditioned on the satisfaction of one party, it concluded that the agreement gave the prospective purchaser absolute discretion whether to perform. Even the purchaser's insistence that the satisfaction clause was subject to a limitation of good faith did not sufficiently circumscribe his discretion. Accordingly, the option failed for lack of mutuality of obligation. Although the purchaser in *Culbertson* did seem to reserve greater flexibility than Mitchell did in *Stone Mountain*, the criticism of *Stone Mountain* in the text applies with equal force to *Culbertson*. Particularly in the case of options, it is difficult to see why the kind of 60-day "free look" contemplated in *Culbertson* should not be enforced, even though the prospective seller is bound while the purchaser is not. The need for feasibility studies and for some assurance the land will be available at the conclusion of such studies seems ample justification for such an arrangement. Indeed the drafters of the *Restatement (Second) of Contracts* recommend the enforcement of options containing a mere recital of consideration, thus making mere form decisive in favor of enforceability. See *RESTATEMENT (SECOND) OF CONTRACTS* § 87(1)(a) (1979).

the contracts in question for lack of consideration. The effect of doing so in *Stone Mountain* was to permit the defendant's general partner to repudiate a perfectly sensible agreement because he was subjected to time pressure by a third party and because he did not like the way Mitchell went about securing railroad approval of a spur line.⁴⁶²

D. *An Advance Response to Fanciful Hypotheticals*

The analysis of the actual operation of the four corollaries to the doctrine of consideration thus suggests the following general conclusions. In each of the cases in which one of the corollaries produces a desirable case disposition, there is another doctrine that leads (or could lead) the court to the same disposition. In cases in which the corollaries are not redundant, they produce undesirable results. In sum, real cases suggest that the corollaries have little merit.

Informal discussion of the foregoing conclusions with various colleagues has provoked the same response on several occasions. In each discussion, one of my colleagues spins a hypothetical involving a promise that may not be desirable to enforce and that only the corollaries to the doctrine of consideration could invalidate. The point of such hypotheticals is to suggest the danger of abandoning the corollaries.

There can be no objection, in the abstract, to the use of such hypotheticals in argument.⁴⁶³ One may, however, object to hypotheticals that are so stripped of factual detail that there is no way to answer them. My experience to date suggests that, when sufficient factual detail is included in a hypothetical that one can realistically imagine it occurring, it ceases to provide support for the corollaries to the doctrine of consideration.

For example, one colleague invented the following hypothetical:

Suppose a painter promises a homeowner to paint the latter's house. In return, the homeowner promises to pay the painter only if he so desires. The painter changes his mind and refuses to paint the house. Should the painter's promise be enforced?⁴⁶⁴

The homeowner's "promise" is obviously illusory, and classical contract theory would imply that it could not be consideration for the

462. Cf. *Tuggle v. Wilson*, 280 S.E.2d 628 (Ga. Ct. App. 1981) (real estate contract subject to ambiguous condition held lacking in mutuality and indefinite, even though party entitled to invoke condition contended it was fulfilled), *rev'd*, 282 S.E.2d 110 (Ga. 1981); *Spellman v. Lyons Petroleum, Inc.*, 709 S.W.2d 295 (Tex. Ct. App. 1986) (alleged oil and gas lease held void for lack of mutuality where draft given in payment was subject to approval of title and lease or mineral deed and contained exculpatory clause in the event it was not paid within ten days).

463. At least one who tells new tales of Sherlock and Mycroft Holmes cannot object to the use of hypotheticals.

464. The hypothetical was created by my colleague, Paul Barron.

painter's promise. The painter's promise would, accordingly, be unenforceable. Moreover, faced with only the foregoing facts, the initial, intuitive reaction of most commentators would probably be that the painter's promise should not be enforced. I suggest, however, that such an intuitive response is based on the fact that the deal is very unfair. It is so one-sided that one immediately suspects that the painter did not understand the illusory character of the homeowner's promise or that the homeowner deceived him or subjected him to unfair bargaining pressure.

The response of the hypothetical spinner to these suspicions is to assume them away. The hypothetical is now to include the facts that the painter has been neither deceived nor bullied and that he understands that the homeowner has reserved absolute discretion on the matter of payment. At this point, the hypothetical is quite puzzling, and one has an overwhelming urge to ask why the painter is making such a silly promise. Is he joking? Is he drunk? Again, the hypothetical spinner responds by assuming away any lack of serious intent or any potential incapacity.

Surely, however, it is fair to ask the hypothetical spinner for the painter's reason for making the promise. The explanation given in the actual discussion of this hypothetical was that the painter has never painted a house in the homeowner's neighborhood before, and he wants a sample of his work for all in the neighborhood to see. He hopes to generate future business in this fashion.

Now it is plausible to view the hypothetical as something that could really happen. At the same time, however, it is plausible to argue that the painter's promise should be enforced. If the painter told the homeowner why he was willing to paint the house in return for an illusory promise, even a classical theorist could presumably find an enforceable bargain. The homeowner has given up his undoubted legal right to exclude the painter from his land and home, and he has therefore suffered the legal "detriment" necessary to constitute consideration. The homeowner has, in effect, loaned the painter the surface of his house.

If the painter communicates the reason for his promise to the homeowner, the hypothetical is an instance of a type of transaction involving an illusory promise that Professor Eisenberg considers both commercially useful and appropriately enforceable.⁴⁶⁵ The painter, according to Professor Eisenberg's analysis, is bargaining for a unilateral contract.⁴⁶⁶ The act for which he is bargaining is literally the "act" of giving him a

465. See Melvin A. Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 649-51 (1982).

466. *Id.* at 649-50. Professor Eisenberg's own hypothetical involves a law student with

chance.⁴⁶⁷ To refuse to enforce his promise because the return promise is illusory is to confuse a successful unilateral contract with an unsuccessful bilateral contract.⁴⁶⁸

The hypothetical spinner's final move is to add the fact that the painter has not told the homeowner why he is willing to paint the house in exchange for an illusory promise. The hypothetical is therefore no longer an example of an express bargain. Nevertheless, in my view, it is still appropriate to enforce the painter's promise. It is a business promise made deliberately in the hope of gaining a business advantage. Even if it is not a bargain, it is similar enough to a bargain to generate the same kind of expectations⁴⁶⁹ and to merit similar enforcement.

It thus appears that, when the hypothetical is fleshed out with sufficient factual detail to make it realistic, it fails to suit its author's purpose. It is not an example of an undesirable promise that only the doctrine of consideration can invalidate. My own experience with other hypotheticals is similar. The more detailed and realistic a hypothetical becomes, the less it supports retention of the corollaries. Legal scholars are a creative group, and one cannot eliminate the possibility that someone will invent a hypothetical in which a corollary to the doctrine of consideration is necessary to invalidate an undesirable promise. However, it is appropriate to insist that any such hypothetical contain sufficient factual detail that one can realistically imagine it occurring. Only then can the likelihood of its occurrence be assessed and the hypothetical harm in abandoning the corollaries to the doctrine of consideration be balanced against the real harm they now cause in real cases.

V. CONCLUSION

The analysis presented in this Article suggests that the four corollaries to the doctrine of consideration have little to recommend them. In cases in which they lead to desirable invalidation of promises, there is usually an alternate doctrine, ranging from the assent doctrines to various defenses based on promisee misbehavior, that also provides a defense to the promise at issue. In cases in which the corollaries are not redundant, however, they appear to cause more trouble than they are worth. When used as substitutes for a proper analysis of a misconduct-

substandard grades whose offer to work for a prestigious firm at a reduced salary is coupled with the grant of an unlimited termination right to the firm.

467. *Id.*

468. *Id.* at 649.

469. It might be objected that the painter's promise has not resulted in any benefit to the painter or induced any reliance on the part of the homeowner. The same, however, is true of any conventional bargain that is repudiated while still completely executory. If ordinary executory contracts are enforced, the same reasons support enforcement of the painter's promise.

based defense or a public policy question, they obscure the true factual or policy issues and lead to dubious case dispositions. Even apart from their pretextual use, however, the corollaries lead to errors of substance. The rule on past consideration leads to underenforcement of subsequent guaranties and produces errors in the application of promissory estoppel and restitution theories. The rules on illusory promises and mutuality of obligation lead to underenforcement of useful business arrangements requiring a great deal of flexibility in performance, including non-standard requirements contracts and contracts containing conditions defined in terms of one party's satisfaction. Finally, neither the corollaries nor the general requirement of bargain seem well-adapted to perform the one gatekeeping function which all agree is required: the isolation of the class of promises too casual to be enforced. If the doctrine of consideration still has any merit, it is not to be found in the four rules discussed in this Article.