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CONSIDERATION AND SERIOUS INTENTION

MINDY **CHEN-WISHART***

The doctrine of consideration has come under increasing attack. In *Gay Choon Ing v. Loh Sze Ti Terence Peter*, Andrew Phang Boon Leong J.A. of the Singapore Court of Appeal raises the spectre of its replacement with the doctrines of economic duress, undue influence, unconscionability and promissory estoppel. In response to the reasoning of Phang J.A. and others, I argue that: (i) consideration is not a meaningless doctrine; in particular, the adequacy of consideration is relevant to the enforceability of an agreement and 'practical benefit' can be made a meaningful concept; (ii) contract law does not, and should not, enforce all seriously intended undertakings; and (iii) the vitiating factors do not simply interrogate the presence of contractual intention and cannot replace the functions performed by consideration.

I. INTRODUCTION

The literature on the doctrine of consideration is conspicuous in the intensity and depth of hostility it has inspired. Lord Goff observed in *White v. Jones*[1] that: "our law of contract is widely seen as deficient in the sense that it is perceived to be hampered by the presence of an unnecessary doctrine of consideration". The 1937 Law Revision Committee in its Sixth Interim Report[2] proposed extending the enforceability of promises in a wide range of circumstances. Abolition has been seriously urged.[3] Professor Burrows states: "The law would be rendered more intelligible and clear if the need for consideration were abolished."[4] In *Gay Choon Ing v. Loh Sze Ti Terence*

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* Reader in Contract Law, Oxford University, and Professor of Law, National University of Singapore. The author thanks Associate Professors Burton Ong and Kelvin Low for comments and Victoria Barns-Graham and Bernd Delahaye for research assistance. A revised version of this paper was delivered at the Inaugural National University of Singapore/Sydney University Law Schools Symposium, The University of Sydney, 29-30 July, 2009.

1 [1995] 2 A.C. 207 at 262-63 (H.L.).

2 U.K., "Statute of Frauds and the Doctrine of Consideration" (1937), Cmd 5449, paras 26-40, 50. See similarly Ontario, Law Reform Committee, *Report on Amendment of the Law of Contract* (1987), chapter 2.

3 Lord Wright, "Ought the Doctrine of Consideration to be Abolished?" (1936) 49 Harv. L. Rev. 1226.

4 Andrew Burrows, *Understanding the Law of Obligations* (Oxford: Hart Publishing, 1998) at 197 [*Law of Obligations*], citing Harvey McGregor, *Contract Code Drawn up on Behalf of the English Law Commission* (London: Sweet & Maxwell, 1993) at 1-3, and the *Unidroit of Principles of International Commercial Contracts*, Art. 3.1. Burrows continues: "and gratuitous promises which have been accepted or relied on were held to be binding (subject to the operation of normal contractual rules relating to, for example, the intention to create legal and relations, duress, and illegality)."

Peter,[5] Andrew Phang Boon Leong J.A. of the Singapore Court of Appeal adds his influential voice to the growing chorus of attacks on the doctrine. Although His Honour ultimately concludes that pragmatism demands the maintenance of the status quo for the time being, he raises the spectre of its replacement with the doctrines of economic duress, undue influence, unconscionability and promissory estoppel. This article challenges the underlying assumptions on which Phang J.A.'s proposed reform is based. Namely, (i) that consideration is a mysterious and emaciated requirement that would be diluted out of existence by acceptance of the notion of "practical benefit"; (ii) that contract law should enforce all seriously intended promises; and (iii) that the vitiating factors and promissory estoppel proposed as substitutes for consideration can and should act as the gate-keepers of serious intention. My thesis is that (i) consideration is not a meaningless doctrine; in particular, adequacy of consideration is relevant to the enforceability of an agreement and 'practical benefit' is a meaningful concept; (ii) contract law does not and should not enforce all seriously intended undertakings; and (iii) the vitiating factors do not simply interrogate the presence of contractual intention. Before that discussion, a preliminary comment is warranted about the reasoning of *Gay v. Loh* itself and it is to this that we first turn.

A. *Breach of Fiduciary Duty*

The litigation involved a bitter dispute between parties who had been friends since the early 1970's when they both served in the Singapore Armed Forces. In 1994, Loh provided $1.55 million for the redevelopment of the family business in which Gay held shares and Gay declared himself a trustee of 1.55 million shares in the Company in favour of Loh.[6] The parties' relationship deteriorated in August 2003 when Gay sought a severance package from Loh for his almost 24 years of service as general manager of Loh's company. After an increasingly heated exchange of accusatory letters and emails, the parties signed an agreement in October 2004 by which Gay would pay $1.55 million for the 1.55 million shares which Gay held on trust for Loh. Gay also signed a Waiver agreeing to leave Loh's company "without claims on the company whatsoever". After full payment by Gay, Loh alleged: (i) rescission of the agreement for, *inter alia*, Gay's breach of fiduciary duty because of his non-disclosure of material information relating to the value of, and dividends due on, the shares, and/or (ii) an account of profits received by Gay from the shares during his trusteeship.

At first instance, Belinda Ang Saw Ean J.[7] substantially agreed with Loh.[8] However, Phang J.A. overturned this decision on an entirely different basis. His Honour explains that "both parties neglected to direct their minds … [to] the crux of the issue"[9] leading the High Court to accord insufficient importance to it.[10] The "real

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5 [2009] 2 S.L.R. 332 (C.A.) (*Gay v. Loh*)

6 *Ibid.* at paras. 19-20.

7 *Loh Sze Ti Terence Peter v. Gay Choon Ing* [2008] SGHC 31 (*Loh v. Gay*)

8 *Ibid.* at para. 92. Her Honour ordered, *inter alia*, that the POA be rescinded on condition that Loh repay Gay $1.5m subject to a right to set-off any dividends payable to him.

9 *Gay v. Loh*, *supra* note 5 at para. 75.

10 *Ibid*. at para. 76. For the High Court's disposal of the defendant's "fallback argument" that the POA and the Waiver Letter constituted a compromise agreement, see *Loh v. Gay*, *supra* note 7 at paras. 94-95.

focal point of the dispute"[11] was simply whether or not the agreement and the waiver constituted a binding compromise agreement between the parties.[12] His Honour concluded that those acts were the "crystallisation of the ongoing negotiations between both parties into a legally binding agreement in which all existing disputes between them were compromised or settled";[13] therefore, Gay's appeal was allowed. The difficulty is that the Court of Appeal's purely contractual analysis side-steps the central issue arising out of the parties' fiduciary relationship. Of course, parties can bargain around fiduciary duties, either *ex ante* (at the time of creating an express trust or by obtaining consent to a conflict of interest as and when it arises)[14] or *ex post* (by ratifying a breach).[15] However, in all instances the beneficiary's *informed* consent is required and the High Court found that Loh gave no such consent because of Gay's non-disclosure. At the time of the alleged compromise, Gay's breach of fiduciary duty was still subsisting and had not been waived or ratified by Loh. With the greatest respect, while the Court of Appeal's analysis of the agreement and waiver as a compromise is correct as a matter of *contract law*, it circumvents Gay's breach of fiduciary duty *in* reaching the compromise which should have entitled Loh to rescind it. This is of particular concern when the Court decides on a basis not put or argued by the parties.[16]

B. *The Coda on Consideration*

After disposing of the case which Phang J.A. concedes posed "no fundamental difficulties with respect to the doctrine of consideration",[17] his Honour went on to present an 11 page critique entitled "A coda on the doctrine of consideration"[18] in

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11 *Ibid*. at para. 39.

12 *Ibid.* at paras. 41-46.

13 *Ibid.* at para. 77.

14 *Boardman v. Phipps* [1967] 2 A.C. 46 (H.L.). For example, in the context of bond issues using a trustee structure: see Ravi Tennekoon, *The Law and Regulation of International Finance* (London: Butterworths, 1991) at 244-45, and Geoffrey Fuller, *The Law and Practice of International Capital Markets* (London: Lexis Nexis Butterworths 2007) at 156.

15 For example, in the context of ratifications by shareholders of a company director's breach of fiduciary duty: see Paul L. Davies, *Gower and Davies' Principles of Modern Company Law*, 8th ed. (London: Sweet and Maxwell, 2008) at 581-588.

16 See Jack Jacob, *The Fabric of English Civil Justice* (London: Stevens & Sons, 1987) at 7-15 for a lucid account of the fundamental features of the adversarial nature of the English civil justice system. He states, at 10: "[the court] has no power or duty to determine what are the issues or questions in dispute between the parties, save as may appear from the pleadings or other statements of the parties." Further, at 13: "[the parties] are free […] to delimit the issues or questions of fact or law […] and the court is bound to confine itself only to those issues or questions and no others." The same principle applies in Singapore: see Yeo Hwee Ying, "Provision of Legal Aid in Singapore" in Kevin Y.L. Tan, ed., *The Singapore Legal System*, 2d ed. (Singapore: Singapore University Press, 1999) at 447: "Under the adversarial system that Singapore inherited from England, the judge does not play an active role in the conduct of the proceedings. How the case is to be fought (or settled) rests solely with the parties."

17 *Gay v, Loh*, *supra* note 5 at para. 92.

18 *Ibid.* at paras. 92-118. For previous extra-judicial critiques of the doctrine of consideration by Phang J.A., see "Consideration at the Crossroads" (1991) 107 L.Q.R. 21; "Acceptance by Silence and Consideration Reined In" [1994] L.M.C.L.Q. 336; and "Reactions to *Williams v. Roffey*" (1995) 8 J. Cont. L. 248. At paras. 61-63, his Honour also offered a critique of the offer and acceptance model of contract formation, recommending a merger of the traditional mirror image approach with the "broad approach"

anticipation of the day that "the issue of reform does squarely arise before this court in the future".[19] The gist of his reasoning is that "the doctrine might now be outmoded or even redundant, and that its functions may well be met by more effective alternatives".[20] Three arguments support this conclusion. First, Phang J.A. notes that Singaporean courts face no legal impediment[21] to extending the notion of "practical benefit" as consideration (recognised in *Williams v. Roffey Bros & Nicholls (Contractors) Ltd*)[22] from promises to pay more, to promises to take less.[23] But, given that the doctrine is already emaciated by the rule that consideration need not be adequate,[24] this extension would simply further dilute the consideration requirement, rendering it otiose or redundant,[25] and bringing the question of its abolition to a head.[26] Second, Phang J.A. agrees that: "The marrow of contractual relationships should be the parties' intention to create a legal relationship".[27] His Honour notes the "proposal of the UK committee to the effect that consideration is merely evidence of serious intention to contract", so that consideration should be dispensed with where evidence of the promise is otherwise available, such as where the promise is in writing.[28] Third, Phang J.A. discusses the replacement of the "outmoded and redundant" consideration requirement with "more effective alternatives"[29] such as economic duress, undue influence and unconscionability which "appear to be more clearly suited not only to modern commercial circumstances but also (more importantly) to situations where there has been possible 'extortion' ".[30] Promissory estoppel is also cited as a possible "alternative doctrine".[31]

Despite these claims, Phang J.A. recognises the long pedigree of the consideration doctrine and that each of the suggested alternatives is "subject to [its] *own specific difficulties*"[32] and may not be "sufficiently well-established … [to] furnish the requisite legal guidance to the courts".[33] In the final analysis, his Honour concludes that

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endorsed by Lord Denning M.R. in *Butler Machine Tool Co. Ltd. v. Ex-Cell-O Corporation (England) Ltd.* [1979] 1 W.L.R 401 (C.A.) at 404.

19 *Ibid.* at para. 94.

20 *Ibid.* at para. 92.

21 *Ibid.* at paras. 106 and 108.

22 [1991] 1 Q.B. 1 (C.A.) [*Williams v. Roffey*].

23 *Gay v. Loh*, *supra* note 5 at paras. 102-103.

24 *Ibid.* at para. 86.

25 *Ibid.* at para. 92. See also para. 97, citing the Singapore High Court in *Sunny Metal & Engineering Pte. Ltd. v. Ng Khim Ming Eric* [2007] 1 S.L.R. 853 at para. 29 [*Sunny Metal*].

26 *Ibid.* at para. 110.

27 *Ibid.* at para. 86, citing V.K. Rajah J.C. (as he then was) in *Chwee Kin Keong v. Digilandmall.com Pte. Ltd.* [2004] 2 S.L.R. 594 (H.C.) at para. 139.

28 *Ibid.* at para. 113.

29 *Gay v. Loh*, *supra* note 5 at para. 92.

30 *Ibid.* at para. 113.

31 *Ibid.* at para. 111.

32 *Ibid.* at para. 114 (emphasis in the original). For critiques of the lack of conceptual clarity and viable criteria for the doctrine of economic duress, the uncertainty that still besets the doctrine of undue influence in its practical application, and the as yet underdeveloped doctrine of unconsionability in English law, see Phang J.A,'s extra-judicial contributions; "Whither Economic Duress? Reflections on Two Recent Cases" (1990) 53 Mod. L. Rev. 107; "The Uses of Unconscionability" (1995) 111 L.Q.R. 559; "Undue Influence Methodology, Sources and Linkages" [1995] J. Bus. L. 552; "Economic Duress: Recent Difficulties and Possible Alternatives" [1997] Rest. L. Rev. 53; 'The Uncertain Boundaries of Undue Influence' [2002] L.M.C.L.Q. 231.

33 *Ibid.* at para. 117.

"maintenance of the status quo … may well be the *most practical* solution inasmuch as it will afford the courts a *range of legal options* to achieve a just and fair result in the case concerned … [notwithstanding] problems of *theoretical* coherence".[34] But, these are insufficient reasons for retaining the consideration doctrine if his Honour's three claims can withstand scrutiny.

II. Consideration: Adequacy and Practical Benefit

A. *Adequacy of Consideration*

While the bargain theory of contract is the most obvious justification for the consideration requirement, Phang J.A. regards this as substantially undermined by the rule that consideration *need not be adequate*. *Chappell & Co. Ltd. v. Nestlé Co. Ltd.*,[35] where the promisor stipulated three wrappers from its chocolate bars in exchange for a gramophone record, is often cited as illustration of the point that even the most trifling benefit or detriment qualifies as valid consideration. Indeed, Atiyah sees the case as enforcing a promise *without* consideration in the traditional sense.[36] But this is a myopic view of the facts. The real values exchanged emerge if we see beyond the intrinsic value of the wrappers to their value in Nestlé's overall marketing strategy. Moreover, the case arose *not* because the customer was trying to obtain the gramophone record but because the owners of the copyright in the music sought an injunction to prevent Nestlé's infringement of their copyright (by failing to pay for their commercial use). In this case, the court's decision was based on substance rather than form.

Other alleged examples of the uncertainty or meaninglessness of consideration will often be explicable in terms of *exceptional* enforcement, not because of the presence of exchange, but in order to protect a party's *reliance*[37] or to reverse *unjust enrichment*[38] when courts had yet to recognise these as bases of liability. Enforcement for nominal consideration is explicable in terms of the common law's acceptance of formalities as an alternative basis of enforcement, and nominal consideration as a good surrogate for formalities. In other cases, policy reasons support the enforcement of the promise despite the absence of bargain consideration.[39] The stretching of an existing rule to reach desirable results is well known in the common law but this does not mean that the rule lacks substance. There is an enormous difference between exceptional deviations because of countervailing policies and an approach that abolishes the rule altogether.

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34 *Ibid.* at para. 118 (emphasis in the original).

35 [1960] A.C. 87 (H.L.).

36 Patrick Atiyah, "Consideration: A Restatement" in ed., *Essays on Contract* (Oxford: Clarendon Press, 1986) at 193 [*Consideration: A Restatement*].

37 *E.g*. *The Santanita* [1895] P. 248 (C.A.), aff'd *sub nom Clarke v. Dunraven* [1897] A.C. 59 (H.L.); *Bainbridge v. Firmstone* (1838) 112 E.R. 1019 (K.B.); *Blackpool and Fylde Aero Club v. Blackpool BC* [1990] 1 W.L.R. 1195 (C.A.).

38 *E.g*. the exception to the past consideration rule based on implied assumpsit; *Lampleigh v. Braithwaite* (1615) 123 E.R. 630 (Court of Common Pleas); *Pao On v. Lau Yiu Long* [1980] A.C. 614 (P.C.).

39 *Ward v. Byham* [1956] 1 W.L.R. 496 (C.A.); *Shadwell v. Shadwell* (1860) E.R. 62 (Court of Common Pleas).

Lastly, while it is true that consideration need not be adequate for contract *formation*, the rule is misleading in that a grossly unbalanced contract can be set aside at the stage of *vitiation*. Unfairness in exchange plays a direct[40] or indirect,[41] although not exclusive, role in a host of *vitiating factors* (*e.g.* misrepresentation, duress, undue influence or unconscionability). Moreover, contractual imbalance may be 'corrected' by the finding of implied terms or collateral terms or by the invalidation of unfair or unreasonable terms by reference to common law[42] or statute.[43]

B. *Practical Benefit*

Phang J.A. rightly recognises that the notion of "practical benefit" must logically be extended from promises to give more, to promises to take less (effectively overruling *Foakes v. Beer*);[44] a step already taken in the Supreme Court of New South Wales in *Musumeci v. Winadell Pty Ltd*.[45] However, his Honour's view that 'practical benefit' dilutes an already emaciated doctrine to the point of abolition is overly pessimistic. If we accept that a bird in the hand is better than two (let alone one) in the bush[46] then the idea that the *actual receipt* of performance (or even part performance) confers a benefit over and above the right to performance is consistent with the core idea of the consideration doctrine as bargain exchange.[47] The important refinement is to replace *Williams v. Roffey*'s bilateral contract analysis with a *unilateral* contract analysis; the modifying promise (to pay more or take less) is only binding if the stipulated return is *actually performed*. This move would have avoided the need to distort the promissory estoppel doctrine in order to enforce a promise to accept part performance in *Collier v. Wright*.[48]

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40 An "improvident transaction" or a "transaction calling for an explanation" is part of the complainant's burden of proof in undue influence and unconscionable bargains.

41 In duress, the unfairness of the demand is treated as *evidence of the causation requirement*: it shows that the threat to breach *must* have induced the other party's agreement: *Barton v. Armstrong* [1976] A.C. 104 (P.C.); *Huyton SA v. Peter Cremer GmbH & Co.* [1999] 1 Lloyd's Rep. 620 (Q.B.). The illegitimacy of the threat depends on the nature of the threat and the nature of the demand: *Universe Tankships Inc. of Monrovia v. International Transport Workers Federation (The Universe Sentinel)* [1983] 1 A.C. 366 (H.L.) [*Universe Tankships*].

42 For example, the penalty rule, restraint of trade, forfeitures, salvage, rescission on terms.

43 For example, under the *Unfair Contract Terms Act 1977* (U.K.), 1977, c. 50 or the *Unfair Terms in Consumer Contracts Regulations 1999*, S.I. 1999/2083.

44 (1883-84) L.R. 9 App. Cas. 605 (H.L.).

45 (1994) 34 N.S.W.L.R. 723.

46 (1883-84) L.R. 9 App. Cas. 605 (H.L.) at 622. Lord Blackburn notes the:

> conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole.

47 See Mindy Chen-Wishart, "'A Bird in the Hand': Consideration and Contract Modification" in Andrew Burrows and Edwin Peel, eds., *Contract Formation and Parties* (Oxford: Hart Publishing) (forthcoming in 2010).

48 [2008] 1 W.L.R. 643 (C.A.). At para. 42, Arden L.J. reformulates the promissory estoppel doctrine as follows:

> [I]f (1) a debtor offers to pay part only of the amount he owes; (2) the creditor voluntarily accepts that offer, and (3) in reliance on the creditor's acceptance the debtor pays that part of the amount he owes in full, the creditor will, by virtue of the doctrine of promissory estoppel, be bound to accept that sum in full and final satisfaction of the whole debt.

Stilk v. Myrick[49] and *Foakes v. Beer* are based on the fiction that a contract right equates with its performance. The unpalatable truth, recognised in *Williams v. Roffey*, is that there is no straightforward equivalence between the two. Contract law itself does not take such an elevated view of contractual obligations. It is trite law that many rules are inconsistent with the protection of a claimant's performance interest.[50] We bargain for performance, but what we get is a more fragile right in remedial terms. This does not necessarily undermine the notion that contract law recognises a duty to perform.[51] We can agree with Friedmann that "the essence of contract is performance. Contracts are made in order to be performed."[52] But contract law must also weigh in the balance other concerns necessary to the protection of the institution of contract. These include: preventing undue harshness to the contract-breaker, avoiding waste, encouraging sensible mitigation, promoting finality in dispute resolution and terminating hostile relationships. To the extent that we accept these values as important, 'inadequacy of remedies' is inevitable. The corollary is that the 'eye of the law' should defer to the eyes of the promisor so long as contract remedies for breach do not fully protect her performance interest.

III. Consideration and Serious Intention

A. *Consideration as Formalities*

In his famous article "Consideration and Form"[53] Fuller set out what is still regarded as the standard modern justification for consideration.[54] The starting point is that a promise is a more secure candidate for enforcement if it is accompanied by a formality such as a deed. This ensures that a promise has actually been made (the evidentiary function), that the promisor understood the consequences of making it (the channelling function) and that she took care in making it (the cautionary function). Fuller

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49 (1809) 2 Camp. 317, 170 E.R. 1168; (Assizes).

50 For example, gain-based damages are rarely awarded; the availability of specific performance is severely limited; agreed damages clauses are unenforceable if they amount to penalties or indirect specific performance; the parties' agreement for specific performance on breach will generally be unenforceable; rules such as remoteness and mitigation cut back the expectation damages to leave the claimant's pecuniary losses inadequately compensated, meanwhile his non-pecuniary losses from the breach (anxiety, annoyance and so on) and from seeking legal redress (typically delay, hassle, time and effort) are not normally compensable at all; punitive damages are generally rejected; and the innocent party may even be prevented from affirming and performing the contract on the other party's anticipatory breach. Contract remedies will usually fall short of vindicating a party's performance interest in full.

51 Daniel Friedmann, "The Performance Interest in Contract Damages" (1995) 111 L.Q.R. 628; Richard Craswell, "Contract Law, Default Rules, and the Philosophy of Promising" (1989) 88 Mich. L. Rev. 489.

52 Friedmann, *ibid*. at 629; Charlie Webb, "Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation" (2006) 26 Oxford J. Legal Stud. 41.

53 (1941) 41 Colum. L. Rev. 799.

54 See Melvin Eisenberg, "Donative Promises" (1979) 47 U. Chi. L. Rev. 1; recast in economic terms in Richard Posner, "Gratuitous Promises in Economics and Law" (1977) 6 J. Legal Stud. 411 [*Gratuitous Promises*]; further expanded in economic terms in Charles Goetz and Robert E. Scott, "Enforcing Promises: an Examination of the Basis of Contract" (1980) 89 Yale L.J. 1261. See also Jack Beatson, *Anson's Law of Contract*, 28th ed. (Oxford: Oxford University Press, 2002) at 88-89; Hugh Beale, ed., *Chitty on Contracts*, 30th ed. (Oxford: Sweet & Maxwell, 2008) at para. 3-001; Edwin Peel, ed., *Treitel: The Law of Contract*, 12th ed. (Oxford: Sweet & Maxwell, 2007) at paras. 3-001 to 3-003 [*Treitel: The Law of Contract*]; Ewan McKendrick, *Contract Law*, 7th ed. (Basingstoke: Palgrave Macmillan, 2007) at 85-88.

argues that the doctrine of consideration performs the same three functions. That is, the presence of consideration should be understood as a reasonably efficient indicator of a promise's existence, seriousness and invocation of legal enforcement.[55] Accordingly, Baragwanath J. of the New Zealand Court of Appeal said in *Antons Trawling Co Ltd v. Smith* that: "[t]he importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself".[56] Consistently, Phang J.A. notes in *Gay v. Loh* the comment in *Treitel on Contract*[57] that "the requirement of consideration dispenses with the need for a separate requirement of an intention to create legal relations";[58] and the observation in *Sunny Metal*[59] that consideration ought to be abolished in paradigm cases of commercial transactions since these are strongly presumed to be accompanied by intention to create legal relations.

Although the presence of consideration may evidence the parties' intention to be bound, its role is not reducible to this.[60] First, an oral agreement may be very difficult to prove or be impulsively made, even if consideration is clearly present. Second, an informal undertaking (not contained in a deed) unsupported by consideration is unenforceable even if the promisor declares in front of witnesses and in writing that she seriously intends to be bound. Third, the absence of consideration does not necessarily, or even normally, indicate that a promise is perjured, incautious or unintended.[61] The view that consideration merely performs the functions of formalities simply does not describe the contract law that we know.

Indeed, much of the scholarship against the consideration doctrine is implicitly or explicitly founded on the idea that it obstructs the enforcement of all promises which respect for the promisor's autonomy demands.[62] The idea that the law should, *prima facie*, support (enforce) all promises is an integral part of contract theories based on the protection of the promisee's reliance[63] or expectation,[64] or the maximisation of welfare.[65] Although the different theories often cast themselves as competitors, they are of a piece in so far as they all presume that if we do not enforce gratuitous

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55 See also *Williams v. Roffey*, *supra* note 22 at 18 (C.A.); Robert Flannigan, "Privity—but the End of an Era (Error)" (1987) 103 L.Q.R. 564 at 586-87; Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 216-17; U.K., Law Commission, "Privity of Contract: Contracts for the Benefit of Third Parties" (Law Com. Consultation Paper No. 121, 1991) at para. 2.9.

56 [2003] 2 N.Z.L.R 23 at para. 93 (C.A.).

57 Peel, *supra* note 54 at para. 4-027.

58 *Gay v. Loh*, *supra* note 5 at para. 71.

59 *Supra* note 25 at para. 29.

60 Alan Brudner, "Reconstructing Contracts" (1993) 43 U.T.L.J. 1 at 34-35, argues that it is inappropriate to compare consideration to formalities as it overlooks the distinctive theoretical foundation and roots of deeds. Deeds are effectively enforced as executed gifts, in the sense of a symbolic delivery of the object, since they are enforceable only upon the act of delivery of the deed to the donee. In contrast, consideration enforces promises *as promises*.

61 Andrew Kull, "Reconsidering Gratuitous Promises" (1992) 21 J. Legal Stud. 39 at 55.

62 Melvin Eisenberg, "The World of Contract and the World of Gifts" (1997) 85 Cal. L. Rev. 821 at 840 [*World of Contract*].

63 Lon L. Fuller & William R. Perdue, "The Reliance Interest in Contract Damages" (1936) 46 Yale L.J. 52.

64 Andrew Burrows, "Contract, Tort and Restitution—A Satisfactory Division or Not?" (1983) 99 L.Q.R. 217.

65 Richard Posner, *Economic Analysis of Law*, 7th ed. (New York: Aspen Publishers, 2007).

promises, "the argument for enforceability based on individual autonomy would collapse".[66] But is that necessarily so?

B. *Serious Intention, Freedom of Contract and Individual Autonomy*

It goes without saying that contractual liability must be based on a party's serious intention to be bound by her undertaking. Personal freedom or autonomy is recognised as valuable morally, politically and economically in modern liberal societies. Its preservation is a ready justification for state action. Its core idea is that of self-authorship; that there is something intrinsically valuable in pursuing freely chosen goals and relationships. The primacy of private ordering receives support from classical liberals and libertarians such as Mill,[67] von Hayek,[68] Friedman,[69] Nozick[70] and Fried.[71] While there is widespread agreement on the value of autonomy, views vary on what it entails. Classical liberal theorists give autonomy a distinctively *negative* emphasis in stressing freedom *from* interference with individual choices. The assumption is that freedom is good and the more of it the better. The correlative demand is for small or minimalist government. In the arena of contract, the State should provide the necessary framework for making and upholding transactions (playing the game of contracting), but it should stay 'hands off' in evaluating the choices made by individuals (it should be 'neutral', 'value subjective', or 'anti-perfectionist'). In this way, the individual's autonomy, as manifested by her intention, is elevated to a pivotal position in a way which tends to shut out other concerns. Indeed, Nozick goes so far as to argue that a consistently libertarian society would allow an individual to sell himself into slavery, rejecting the notion of inalienable rights.[72]

However, this absolutist position is untenable. If autonomy was the sole and unqualified value, contract law would have little content. All contractual questions (When is there a contract? What are its contents? Is a contract vitiated? What are the remedies for breach?) would be answered solely by reference to the parties' intentions. The only issue becomes one of fact finding. In truth, most of contract law relates to the *qualifications* on the core idea of enforcing seriously intended undertakings; that is, to the *limits* of freedom of contract. No legal system does or can enforce all promises and the idea that all serious undertakings should be respected gives no guidance in determining *which* undertakings should be supported by the force of law. Nor, for example, can it explain why certain express terms should be unenforceable (*e.g.* penalty clauses) or be supplemented by terms implied in law;

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66 Kull, *supra* note 61 at 62.

67 John Stuart Mill, *On Liberty* (London: Parker and Son, 1859).

68 Friedrich A. von Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 2007); *Individualism and Economic Order* (Chicago: University of Chicago Press, 1996); *The Constitution of Liberty* (London: Routledge, 2006); *Law, Legislation and Liberty* (comprising *Rules and Order*) (London: Routledge, 1998); *The Mirage of Social Justice* (London: Routledge & Kegan Paul, 1976); and *The Political Order of a Free People* (London: Routledge & Kegan Paul, 1979).

69 Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 2002).

70 Robert Nozick, *Anarchy, State and Utopia* (Chicago: University of Chicago Press, 2002).

71 Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard: Harvard University Press, 1982).

72 Nozick, *supra* note 70 at 33.

or what to do when, as will often be the case, the parties' intentions are absent or contradictory.

Not only is the idea of respect and thus enforcement of every promise inaccurate as a matter of description of contract law, it is also normatively questionable. First, if we value freedom of choice then we should value equally highly an individual's subsequent abandonment of her initial choice. There is no reason to prioritise a past choice over a present one when both are equally valid expressions of her freedom.[73] Second, it would be a very different world from the one we know if we were "bound by every promise, no matter how foolish, without any chance of letting increased wisdom undo past foolishness. Certainly, some freedom to change one's mind is necessary for free intercourse between those who lack omniscience".[74] An integral part of any valuable autonomous life is the ability to learn, change, mature and recreate oneself. This may entail the rejection or alteration of previous beliefs or goals. Even when account is taken of the value of learning from one's mistakes, coerced performance of one's regretted promises may unduly compromise one's integrity and self-respect[75] (hence damages is the primary remedy for breach, rather than specific performance), or may jeopardise one's future autonomy (hence the invalidity of slavery contracts and unreasonable restraints of trade, and the facility of bankruptcy which allows a fresh start). Third, even if we believe that the promisor should do as she promises (for example, as a matter of self-consistency), it does not explain why contract law should weigh in on behalf of the *promisee* as a matter of justice. For this we need the doctrine of consideration.[76]

Valuable freedom goes beyond negative freedom; beyond freedom from restraint to do whatever we like even at the expense of others' freedom.[77] Other values such as welfare, equality (which entails respect for others and distributive fairness) and the facilitation of human flourishing[78] have been incorporated into a more nuanced and *positive* version of freedom which has become the central idea of *modern* liberalism.[79] On this view, the individual's intention is not the be all and end all. It is a *necessary but not sufficient* condition of contractual liability, leaving room for other important values. Before we explore some of these competing values and how they are accommodated in the law, a comment is due on the obvious substitute for consideration which was not expressly considered in *Gay v. Loh*; namely, the requirement of *intention to create legal relations*.

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73 Brudner, *supra* note 60 at 21.

74 Morris Cohen, "The Basis of Contract" (1933) 46 Harv. L. Rev. 553 at 572.

75 Anthony Kronman, "Paternalism and the Law of Contract" (1983) 92 Yale L.J. 763.

76 See below at V.

77 Thomas Green, "Liberal Legislation and Freedom of Contract", in Thomas Green, Paul Harris & John Morrow, eds., *Lectures on the Principles of Political Obligation* (Cambridge: Cambridge University Press, 1986).

78 Margaret Radin, "Market-Inalienability" (1987) 100 Harv. L. Rev. 1849.

79 *Two Concepts of Liberty* was Isaiah Berlin's inaugural lecture delivered at the University of Oxford in 1958 and appears in Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969) and Henry Hardy, ed., *Isaiah Berlin: Liberty* (Oxford: Oxford University Press, 2002). See also Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Oxford: Hart Publishing, 2003) and the discussion below on Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1988) [*The Morality of Freedom*].

C. *Intention to Create Legal Relations*

In the long run, the test of "intention to create legal relations" is highly unlikely to work any better than the rules of consideration. First, the phrase is apt to confuse as it has at least two meanings. "Intention to create legal relations" as an independent requirement of contract formation takes the form of two strong, although rebuttable, presumptions: that *commercial* agreements are prima facie enforceable and *social and domestic* agreements are not. In this sense the formulation is misnamed since it has less to do with the parties' intentions to be bound in any meaningful sense, than with the appropriateness of enforcement in the particular contexts. It is now widely accepted that the respective presumptions have their source in *public policy*. These include the concern to avoid opening the floodgate to litigation;[80] the promotion of market transactions between people without a pre-existing relationship who would otherwise be reluctant to contract; and, the concern to limit state intrusion in the private lives of its citizens.[81] There are limits to what that the law can achieve.[82] Sometimes, the support of valuable social practices may demand non-involvement. This theme is picked up again in Part V.B as supporting the retention of bargain consideration.

Intention to create legal relations in its alternative and substantive sense is that parties must intend to be legally bound. This intention is already necessary to find an "offer", an "acceptance" and to overcome any uncertainty, each of which is already a constituent of an enforceable contract. In this sense, intention to create legal relations as an additional requirement is superfluous; even supporters of consideration take its necessity for granted. The crux of support for the serious intention test is the elimination of any *other* criterion for enforcement. But, given that no legal system enforces all promises, "to abolish the doctrine of consideration, therefore, is simply to require the courts to begin all over again the task of deciding what promises are to be enforceable".[83]

The second difficulty with the 'intention to create legal relations' test is in determining the parameters for enforcing *gratuitous* promises (unsupported by consideration) accompanied by this intention. Atiyah[84] recognises that the issues arising are much too complex and difficult "to generalise about in advance, because so much

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[80] In *Balfour v. Balfour* [1919] 2 K.B. 571 (C.A.), Atkin L.J. said at 579: "[t]he small Courts of this country would have to be multiplied one hundredfold if these arrangements [social and domestic] were held to result in legal obligations." The Scottish Law Commission in *Memorandum No 36. Constitution and Proof of Voluntary Obligations: Formation of Contract*, 10 March 1977, took the view, at para. 72 that: "[I]t is, in general, right that courts should not enforce entirely social engagements, such as arrangements to play squash or to come to dinner, even though the parties themselves may intend to be legally bound thereby."

[81] Atkin L.J. said in *Balfour v. Balfour*, *ibid*. at 579:

> Agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses... The terms may be repudiated, varied or renewed as performance proceeds or as disagreements develop, and the principles of common law... find no place in the domestic code... In respect of these promises each house is a domain into which the King's writ does not seek to run.

[82] Lon L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353.

[83] Atiyah, *Consideration: A Restatement*, *supra* note 36 at 241.

[84] *Ibid*.

depends on the context in which they arise".[85] His discussion gives a flavour of the difficulty and intractability of the issues that must be addressed by this rival test of enforcement:

> [I]t will be necessary to start by asking more about the concept of a 'gratuitous' promise. To be legally enforceable, gratuitous promises will presumably need to be sensible, rational activities. But surely we may need to ask more about the kind of circumstances in which people do rationally make gratuitous promises, and we may need to distinguish various classes of cases… [it may be undesirable to enforce them] to the same extent as ordinary commercial promises… it may be wise to provide for a much wider defence of frustration… Perhaps too, a wider latitude should be allowed to some form of defence based on mistake. Perhaps we need to consider the possibility of the conduct of the promisee depriving him of the right to enforce a gratuitous promise. Perhaps we need to consider a shorter limitation period. And perhaps, after all some gratuitous promises may be better treated as merely giving rise to a defence rather than a cause of action at [he footnotes here that 'perhaps after all the modern Orthodoxy may have something to be said for it']… In short, we must look to the reasons (all considerations) which make it just or desirable to enforce promises, and also to the extent to which it is just to enforce them.[86]

The same issues will arise when, inevitably, courts are asked to construe precisely *what* the parties seriously intended to be bound by and *how*. The questions follow in rapid succession: Bound to *what* legal effect? What rights or liabilities were intended to be transferred, created, waived, or suspended by the promisor? Was it to be absolute or conditional? To what excuses (vitiating factors) was it to be subject? Such an elastic criterion as the intention to create legal relations will be no less problematic or susceptible of judicial manipulation than bargain consideration itself.

In the organic system that is the common law of contract, rights, remedies and excuses are interconnected. At its most basic, contract orthodoxy sets a threshold of enforceability based on bargain consideration, is restrictive of the scope of excuses, and normally enforces to the full extent the promisee's expectations. Expanding the basis for enforcement will require the appropriate recalibration of the excuses and remedies. If enforcement is to be divorced from exchange, it is not obvious what the proper remedial response should be. The demands of justice will vary with the particular *context* (whether commercial, consumer, charitable, family, and so on) and the particular *reason* for enforcement (whether bargain, reliance suffered, benefit received, fulfilment of family responsibilities, and so on). An expansion into *non-bargain criteria for enforcement* would necessitate enormous compromises which will weaken rather than strengthen the internal coherence of contract law.

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[85] *Ibid*. at 242.
[86] *Ibid*. at 241-243.

IV. Consideration, Vitiating Factors and Promissory Estoppel

A. *Defeasibility*

Phang J.A. suggests that consideration's functions can be replaced or is already being performed by the vitiating factors of duress, undue influence and unconscionability. This assumes what HLA Hart warns against. In *The Ascription of Responsibility and Rights*[87] Hart describes the line of reasoning that since consent gets you into contract, only lack of consent will get you out[88] as "a disastrous over-simplification and distortion" of the law governing the *vitiation* of transactions. It fails to recognise: (i) that consent is a necessary *but not sufficient*, condition of transactional liability, and (ii) that the validity of a transaction is a *two-stage* inquiry, so that even when the language of consent is used in determining both the formation and vitiation stages, they deal with *qualitatively different* concerns. It is a mistake to think "that there are certain psychological elements required by the law as necessary conditions of contract and that the defences are merely admitted as negative *evidence* of these". Rather, talk of "defective consent" in the context of vitiating factors is *conclusory*, not explanatory; it is a merely short-hand for the variety of factors rendering a transaction *defeasible*.[89] In this sense contract is a "defeasible" concept.[90]

Hart's counsel allows us to detach the basis for *vitiating* transactions from the basis for *enforcing* them. Space is then opened up to consider values at work *other than consent*. The question is whether, in view of the relevant circumstances bringing the case within a recognised head of exception, a claimant should be *relieved* of responsibility for the transaction, *despite* her consent to it.[91] The substitutes for consideration suggested by Phang J.A. (duress, undue influence and unconscionability) bear this out. These doctrines do not investigate the presence or absence of contractual intention in any empirically meaningful sense. Rather, they can be said to relate to the protection of the institution of contract, the contract parties' welfare, and the social forms that make the pursuit of *valuable* (non-demeaning, self-fulfilling, and meaningful) autonomous life plans or choices of a realistic prospect.

On Raz's account,[92] the qualification "valuable" is of fundamental importance. Since people only derive well-being from ways of life which are valuable, the state need not defend worthless options that one is better off not having.[93] Hence "the autonomy principle is a perfectionist principle … [it] permits and even requires government [i.e. law] to create and support morally valuable opportunities, and to

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87 Herbert Lionel Adolphus Hart, "The Ascription of Responsibility and Rights" in *Proceedings of the Aristotelian Society* (London: Harrison & Sons, 1948) 171; also in Antony Flew, ed., *Logic and Language—First Series* (Oxford: Basil Blackwell, 1952) 145 at 173.

88 *Ibid.* at 183.

89 *Ibid.* at 145 and 174-8. At 180, Hart explains that "the logical character of words like 'voluntary' are anomalous and ill-understood. They are treated in such definitions as her words having positive force, yet, as can be seen from Aristotle's discussion in *Book III of the Nicomachean Ethics*, the word 'voluntary' in fact serves to exclude a heterogeneous range of cases such as physical compulsion, coercion by threats, accidents, the stakes, *etc.*, and not to designate a mental element or state; nor does 'involuntary' signify the absence of this mental element or state."

90 *Ibid.* at 174-176 (emphasis in the original).

91 *Ibid.* at 174.

92 Raz, *The Morality of Freedom*, *supra* note 79.

93 *Ibid.* at 338.

eliminate or discourage repugnant ones".[94] Isaiah Berlin's concern that the concept of *positive* autonomy can descend into abuse and totalitarianism when *applied*, is met by Raz's counsel that the value of autonomy requires a *wide margin of tolerance* in our conceptions of the valuable[95] and to confine perfectionist measures "to matters which command a large measure of social consensus". Eliminating the worst choices and the most abusive social forms increases individuals' chances of living good autonomous lives, whilst still leaving plenty of sub-optional options to choose from.

B. *Duress, Undue Influence and Unconscionability*

Hart's defeasibility thesis resonates with rejection of the 'overborne will' explanation of duress. Lord Scarman said: "The classic case of duress is … not the lack of will to submit but the victim's intentional submission arising from the realization that there is no practical choice open to him."[96] Where this results from the defendant's illegitimate pressure, the law does not ascribe the normal responsibility it would to the victim's consent. This view avoids the fiction that the claimant gave no effective consent despite acting knowingly and intentionally.[97] Rather, it takes the realistic and respectful view that the claimant engaged with reason in consenting to the transaction,[98] but should nevertheless be excused from responsibility in the circumstances.

What are those circumstances? Since scarcity is pervasive, all choices can be said to be constrained. But, actionable duress is not about the claimant *feeling* under pressure to agree, however strong the pressure. Valid consent does not require freedom from pressures. I may have 'no choice' but to agree to the interest rate set by the lender, or to the prices charged for the food, shelter or clothing that I 'need', but such ordinary pressures will not excuse me from my contractual responsibilities. As Lord Wilberforce said in *Barton v. Armstrong*:[99] 'in life...many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this the pressure must be one of the kind which the law does not regard as legitimate.' Thus, the concept of individual freedom provides little assistance in distinguishing acceptable constraints from the unacceptable.[100] It is impossible to generate a coherent theory of duress by reference to the *internal* will of the parties.[101] To distinguish acceptable constraints from the unacceptable, we need to appeal to factors *external* to the will of the parties, starting with the legitimacy of the defendant's threat.

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94 *Ibid.* at 417.

95 *Ibid.* at 381.

96 *Universe Tankships*, *supra* note 41 at 400.

97 Patrick Atiyah, "Economic Duress and the Overborne Will" (1982) 98 L.Q.R. 197 [*Economic Duress*]; *Lynch v. DPP for Northern Ireland* [1975] 1 All E.R. 913 (H.L.) at 926-38.

98 Hence the requirement that she has "no practicable alternative".

99 [1976] A.C. 104 (P.C.) at 121.

100 Only in the extreme cases of someone seizing my hand and forcing me to sign a contract, or my signing a contract while sleepwalking, is there an absence of consent.

101 Atiyah, *Economic Duress*, *supra* note 97; David Tiplady, "Concepts of Duress" (1983) 99 L.Q.R. 188; Patrick Atiyah, "Duress and the Overborne Will Again" (1983) 99 L.Q.R. 353.

This is even more evident in cases of undue influence where, typically, the more severe the case, the more willing the claimant will be to consent to the contract. I argued elsewhere[102] that undue influence cannot be understood in terms of defective consent. As with duress, Lord Nicholls said in *Royal Bank of Scotland Plc v. Etridge (No 2)*[103] that whenever the defendant's procurement of the claimant's consent is judged improper, that consent will not be *deemed* an expression of the claimant's will. Recognition of this avoids the unrealistic and insulting characterisation of a claimant who chooses to trust the defendant's judgment as thereby 'impaired' or not having *really* consented. Relationships of trust and confidence are a vital part of a good life. Acting relationally is not pathological. But going beyond the procedural or substantive boundaries constitutive of the relationship *is* pathological. Undue influence responds to the harm to the autonomy-enhancing relationships of influence; it also responds to harm to the claimant's *personal autonomy* when she makes a transaction that seriously jeopardises her chances of leading an autonomous life.[104] This explains why undue influence cases involve transactions that have catastrophic (not just sub-optimal) consequences for the claimant's substantive welfare.[105] It is consistent with the law's opposition to contracts of slavery, unreasonable restraints of trade and other unconscionable contracts.

Although the doctrine of unconscionable bargains is described by Phang J.A. as "fledgling",[106] it is well established in Australia,[107] New Zealand,[108] and Canada[109] and is certainly recognised in English[110] and Singaporean[111] law. Where unconscionability has been found, it is often difficult to put your finger on precisely what the defendant has done wrong and why the claimant warrants special protection. In contrast, the extreme unfairness of the transaction to the claimant is usually glaring. Mere undervalue is insufficient, the contract must be overreaching and oppressive or entail such substantial undervalue that it "shocks the conscience of the court"[112] and threatens the future freedom of the claimant. Refusal to enforce such contracts

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[102] Mindy Chen-Wishart, "Undue Influence: Beyond Impaired Consent and Wrong-Doing, Towards a Relational Analysis" in Andrew Burrows and Alan Rodger, eds., *Mapping the Law: Essays in Honour of Peter Birks* (Oxford: Oxford University Press, 2006) 201; Mindy Chen-Wishart, "Undue Influence: Vindicating Relationships of Influence" (2006) 59 Curr. Legal Probs. 231.

[103] [2002] 2 A.C. 773 at para. 7 (H.L.).

[104] To the same effect, see Kimel, *supra* note 79 at 133; Stephen Smith, "In Defence of Substantive Unfairness" (1996) 112 L.Q.R. 138 [*Substantive Unfairness*].

[105] For example, *Allcard v. Skinner* (1887) L.R. 36 Ch. D. 145 (C.A.); *Crédit Lyonnais v. Burch* [1997] 1 All E.R. 144 (C.A.). See Mindy Chen-Wishart, "The O'Brien Principal and Substantive Unfairness" (1997) 56 Cambridge L.J. 60; *Cheese v. Thomas* [1994] 1 W.L.R. 129 (C.A.); *Hammond v. Osborn* [2002] EWCA Civ. 885.

[106] *Gay v. Loh*, *supra* note 5 at para. 112.

[107] For example, *Commercial Bank of Australia v. Amadio* (1983) 151 C.L.R. 447 (H.C.A.).

[108] For example, *Hart v. O'Connor* [1985] A.C. 1000 (P.C.); *Gustav & Co Ltd v. Macfield Ltd* [2008] N.Z.S.C. 47 (S.C.).

[109] *Morrison v. Coast Finance Ltd* (1965) 55 D.L.R. (2d) 710 (B.C.C.A.); *Harry v. Kreutziger* (1978) 95 D.L.R. (2d) 231 (B.C.C.A.); *Knupp v. Bell* (1968) 67 D.L.R. (2d) 256 (B.C.C.A).

[110] *Multiservice Bookbinding v. Marden* [1979] Ch. 84 (Ch.); *Alec Lobb (Garages) Ltd v. Total Oil (Great Britain) Ltd* [1985] 1 W.L.R. 173 (C.A.); *Boustany v. Piggott* (1995) 69 P. & C.R. 298 (P.C.).

[111] *Lim Geok Hian v. Lim Guan Chin* [1994] 1 S.L.R. 203 (H.C.); *Fong Whye Koon v. Chan Ah Thong* [1996] 2 S.L.R 706 (H.C.); *Rajabali Jumabhoy v. Ameerali R Jumabhoy* [1997] 3 S.L.R. 802 (H.C.).

[112] *Alec Lobb (Garages) Ltd v. Total Oil (Great Britain) Ltd* [1983] 1 W.L.R. 87 (Ch.D.) at 94-95.

is consistent with the state's primary duty to promote, protect and foster the positive autonomy of its citizens.

The private nature of contract law means that "[*t*]*he law* does not *impose civil liability*. The law *empowers* private parties to have other private parties held liable to them, *if they choose*".[113] Power is conferred[114] on individuals who satisfy certain conditions to obtain state assistance to coerce another individual to do something (perform a contract, pay damages). Since the state is essentially involved in private actions, the paradigm is one of state subsidisation of a worthwhile activity. But, there is no reason for the state, via the law, to subsidise in an unqualified way. It can and should refuse to support unconscionable contracts. Broadly speaking, the law should not implicate itself in (be complicit with, collude in) 'that sort of thing'. The same reasoning underlies the unenforceability of contracts which are illegal or contravene public policy. Shiffrin[115] speaks of the law's avoidance of complicity with exploitation; Dalton[116] refers to the restraint on self-interest necessitated by norms of *decency* and *equality*; Smith[117] argues that contracts at non-normal prices disrupt individuals' planning and ability to lead self-directed, autonomous lives.

C. *Promissory Estoppel*

Unlike the vitiating factors above, promissory estoppel is overtly concerned with more than the parties' serious intention. Its core ingredients are a clear promise, reliance on that promise, and inequity in resiling. As Phang J.A. notes, "pockets of controversy" surround the concept of reliance, whether the effect of promissory estoppel extinguishes the original right or only suspends it until the promisee can resume his original position or cease her reliance, and whether it can be used as a "sword" (a cause of action) or only as a "shield" (a defence).[118] The strongest reason for barring promissory estoppel from creating a new cause of action is the concern to avoid a head-on clash with the requirement of consideration. However, such a clash is avoided by the simple recognition, highlighted by the High Court of Australia in *Walton Stores (Interstate) Ltd v. Maher*[119] that consideration and promissory estoppel generate *different* types of liability. Consideration yields a contractual cause of action for the promisee's *full expectation*, while promissory estoppel responds to the promisor's unconscientious refusal to make good his promise after inducing the promisee's reliance and seeks to *avoid the detriment* which the promisee has or would suffer.

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[113] Benjamin Zipursky, "Philosophy of Private Law" in Jules Coleman & Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 623 at 655 (emphasis added).

[114] Herbert Lionel Adolphus Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994) at 27-38 designates legal rules that recognise private claimants as having rights of action as 'power-conferring rules'.

[115] Seana Shiffrin, "Paternalism, Unconscionability, and Accommodation" (2000) 29 Phil. & Pub. Aff. 203.

[116] Clare Dalton, "An Essay in the Deconstruction of Contract Doctrine" (1985) 94 Yale L.J. 997 at 1024-38.

[117] Smith, *Substantive Unfairness*, *supra* note 104.

[118] *Gay v. Loh*, *supra* note 5 at para. 115.

[119] (1988) 164 C.L.R. 387 (H.C.A.).

Spence[120] persuasively argues in favour of a 'duty to ensure the reliability of induced assumptions'. Recognising such an action would bring coherence (by permitting the operation of promissory estoppel in promises to pay more as well as promises to take less) in a way which mirrors the extension of "practical benefit" to promises to take less. But such an action would have more in common with negligent misstatement than breach of contract. To allow promissory estoppel to substitute for consideration would be a mismatch which confuses the different bases for enforcement. We should continue "the present usage of reserving 'consideration' for bargains leading to fully enforceable contracts and to recognise that though some promises may be enforceable without consideration, the full "normal" panoply of contract remedies, in particular damages measured by the value of the promised performance, may not always be appropriate".[121]

V. The Purpose of Consideration

Nothing said in Part IV is fatal to the case for abolishing the consideration doctrine if it is really 'empty' and adds nothing to the test for enforcement so far stated (serious intention subject to the stated qualifications). In two places Phang J.A. seems to recognise a distinctive role for the consideration doctrine. First, his Honour sees the "'modern' purpose of the doctrine of consideration is to *put some legal limits on the enforceability of agreements, even where they would* [should?] *otherwise be legally binding*".[122] Second, his Honour concludes that the retention of consideration gives the courts "*a range of legal options* to achieve a just and fair result".[123] This Part starts to flesh out this intuition by reference to the paradigm of reciprocity outside the domestic and social context.

A. *Reciprocity Outside the Social Context*

Reciprocity is a generalised moral norm which defines certain actions and obligations as repayments for benefits received. It is a mutually gratifying pattern of exchanging goods and services which fosters mutual dependence and facilitates division of labour. Reciprocity is a deep instinct and the basic currency of social life. In his seminal work "The Norm of Reciprocity: a Preliminary Statement"[124] Alvin W. Gouldner describes reciprocity as one of the universal "principal components" of moral codes. His survey of extensive anthropological studies[125] highlights reciprocity as being

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[120] Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Oxford: Hart Publishing, 1999) at 2-3.

[121] Stephen M. Waddams, *The Law of Contracts*, 5th ed. (Ontario: Canada Law Book, 2005) at para. 21. Similarly Guenter Treitel, "Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement" (1976) 50 A.L.J. 439 at 441: "Contract does not exhaust the category of statements which are actionable or otherwise capable of having legal effects."

[122] *Gay v. Loh*, *supra* note 5 at para. 98 (emphasis in the original).

[123] *Ibid.* at para. 118 (emphasis in the original).

[124] Alvin W. Gouldner, "The Norm of Reciprocity: A Preliminary Statement" (1960) 25 Am. Soc. Rev. 161 at 169-70.

[125] L.T. Hobhouse, *Morals in Evolution: A Study in Contparative Ethics* (London: Chapman and Hall, 1951) at 123; Richard Thurnwald, *Economics in Primitive Communities* (Oxford: Oxford University

of primal importance; one which "pervades every relation of primitive life". Others agree that reciprocity is the basis on which the entire social and ethical life of civilizations rest.[126] Rather than the economists' *homo economicus*, the designation *homo reciprocus*[127] captures a more fundamental aspect of human behaviour. Social equilibrium and cohesion in all societies could not exist without reciprocity; "all contacts among men rest on the schema of giving and returning the equivalence".[128]

Bargains and conditional reciprocation provide the overwhelming, and commercially most important, explanation of contractual liability. Preserving a distinct category for them reflects important values and serves important functions. We can readily make arrangements with friends and family in whom we have a degree of trust, backed up by social or moral sanctions. But we cannot readily 'do deals' with strangers because of the gap in trust and sanctions. To enhance personal autonomy contract law facilitates reciprocal interaction between strangers by filling this gap in trust and sanctions.[129] "But for the support of the law, contracts between complete strangers would not be as numerous and common as they are."[130] The primary purpose of contract law is to allow us to do things "with others not only outside the context of already-existing relationships, but also without… being required to know much or form opinions about the personal attributes of others, and without having to allow others to know much and form opinions about oneself".[131] The conceptual core of contract is the self-interested exchange, in which contract stands apart from status, custom, and other more contextual forms of relating to others that may sometimes accompany contractual activity.

The presumption *for* enforcing *commercial* contracts (under the rubric of 'intention to create legal relations') is consistent with contract law's primary function of facilitating exchanges between strangers. State enforcement where informal social sanctions are ineffective makes sense. Non-enforcement would bias exchanges "toward those that take place instantly, as distinct from those that are completed only over a period of time",[132] toward persons with a reputation for keeping their promises or compel resort to alternative enforcement methods (such as those favoured by the loan sharks). Parties will hesitate to part with the promised performance before the other has handed over the reciprocal benefit. Like participants at a disarmament conference or a hostage swap each says to the other "you first!"

The deep instinct for reciprocation is particularly strong outside the social context. Legal enforcement of exchange reflects the *form* of respectful engagement at formation (the *substance* is controlled elsewhere) in that each party is not merely a

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Press, 1932) at 106 and 137 [*Economics in Primitive Communities*]. See also Richard Thurnwald, "Banaro Society: Social Organization and Kinship System of a Tribe in the Interior of New Guinea" in *Memoirs of the American Anthropological Association, No. 3* (Washington D.C.: American Anthropological Association, 1916) at pt. 4, 8; George Homans, "Social Behaviour as Exchange" (1958) 63 Am. J. Soc. 597; Raymond Firth, *Primitive Polynesian Economy* (London: Routledge, 2004).

126 Thurnwald, *Economics in Primitive Communities*, *ibid*. at 106.

127 Howard Becker, *Man in Reciprocity* (New York: Prager, 1956).

128 Kurt Wolff, ed., *The Sociology of Georg Simmel* (Illinois: Free Press, 1950) at 387, quoted in Gouldner, *supra* note 124 at 162.

129 Robert Scott, "Error and Rationality in Individual Decision-Making: An Essay on the Relationship between Cognitive Illusions and the Management of Choices" (1986) 59 S. Cal. L. Rev. 329 at 354.

130 Joseph Raz, "Promises on Morality and Law" (1982) 95 Harv. L. Rev. 916 at 934.

131 Kimel, *supra* note 79 at 78.

132 Posner, *Gratuitous Promises*, *supra* note 54 at 413-414.

means of facilitating the other's end, but is also recognised as an equal whose *end* is simultaneously served by the other. Each party is a giver of her own undertaking and a recipient of the other's undertaking. In contrast, enforcement of gratuitous promises outside the domestic and social context would allow the promisee to treat the promisor merely as a means to her own end. Phang J.A. (writing extra-judicially) said:

> [T]he idea of consideration finds support in the everyday dealings of commercial people. It is, after all, the essence of standard commercial bargain that one party agrees to purchase something… from another. Promises are not made in the air… one reason for retaining consideration lies in the fact that it is not a mere legal construct. It serves the function it was designed to serve—marking off those promises which count as contractual promises from those which do not—*because it does reflect commercial reality. In commerce, to be entitled to enforce a promise you have to purchase it*.[133]

Accordingly, the bargain theory, unlike the will theory,[134] also explains *who* can sue on the promise and the *extent* of the claimant's right. The expectation measure, the distinctive feature of a contractual action, gives the promisee the value of the promised performance *because* she has given the agreed equivalence of that performance.

Other rules in private law reinforce the bargain-gift distinction.[135] The equitable maxim that 'equity will not assist the volunteer' translates into a refusal to specifically enforce gratuitous bare promises contained in a deed. A deed tainted by mistake is easier to set aside than a contract made for good consideration.[136] At law and in equity protection is given to good faith purchasers (not donees) *for value* without notice of a prior proprietary interest in the property. A transfer without consideration comes up against the presumption *against* advancement barring specified exceptions. Similarly, whether a transaction is supported by consideration is relevant to whether it can be set aside on a party's insolvency. In these instances, consideration is not a proxy for formalities, but expresses our intuition that one who has provided consideration is more deserving than one who has not.

B. *Undertakings in the Social and Domestic Context*

In all societies gift giving is a powerful force binding social groups together. People give gifts to express their friendship, love, comradeship, gratitude, benevolence or generosity;[137] to signal their commitment and trustworthiness, to promote solidarity, and affirm social worth. Such interactions foster trust which not only facilitates cooperation but also helps to create the sort of society in which human beings thrive

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[133] John W. Carter, Andrew Phang & Jill Poole, "Reactions to Williams v Roffey" (1995) 8 J. Cont. L. 248. (hereafter 'Reactions') at 249-50 (emphasis added).

[134] Brudner, *supra* note 60 at 21 fn. 27. The promisee's right to sue on the promise cannot be derived either from the moral obligation of the promisor or from the public policy of promoting reliance (which can also be served by state-imposed penalties for breach).

[135] Robert Stevens, "The Contracts (Rights of Third Parties) Act 1999" (2004) 120 L.Q.R. 292 at 322.

[136] *Lady Hood of Avalon v. Mackinnon* [1909] 1 Ch. 476 (Ch.). In this case, the claimant settled £8,600 on both her daughters, having forgotten that she had previously settled an even larger sum on the elder daughter. Her gift was set aside.

[137] Eisenberg, *World of Contract*, *supra* note 62 at 823.

and sensibly want to live. While reciprocity also colours transactions in the domestic and social context, it does so in a distinct way. The obligations to give, accept and reciprocate arise from status (although we may voluntarily assume the status) and customs, reflect the relational values of trust, care and good will and tend to be aspirational. Transfers or undertakings in this context are not *explicitly* conditional on reciprocation. Of course, to say that one *asks* for nothing in return is not to say that one expects nothing in return, but there must be an element of discretion left to the donee/promisee as to the reciprocation.

In this context, enforcement of gratuitous promises is simply unnecessary for them to continue to play their valuable social and economic roles. The prospect of extralegal sanctions (such as alienating the promisee, incurring the disapproval of others or otherwise damaging her general reputation and credibility),[138] and the parties' "interdependent utility" (the promisor benefits from the promisee's gain and bears, in part, the promisee's loss)[139] will usually ensure the reliability of promises.

Moreover, state enforcement may be counter-productive and exacerbate the problem they were supposed to resolve. Informal arrangements may be binding in morality or etiquette, to be settled by compromise or informal social sanctions, but they should not be the subject of coerced performance or of damages. There is value in freedom *from* contract as much as freedom *of* contract. Contractual regulation of social and domestic relationships would risk reducing them to measurable obligations and subverting the more open-ended and diffuse obligations that characterise relationships arising from trust, friendship, family and the like.[140] This is so not only in the case of apparently one sided undertakings, but even *reciprocating* parties in the social and domestic context are presumed not to "intend to be legally bound".

Nevertheless, the law allows for the exceptional case where explicitly reciprocating parties in the domestic or social context make particularly clear their intention to invoke the force of the law (hence rebutting the presumption of unenforceability). Likewise, the law enlarges autonomy by providing a facility for the exceptional donor who, instead of performing immediately or merely stating an intention to perform, seeks to bind herself to a gratuitous promise (hence the device of the deed). Even so, such contracts attract the suspicion of the undue influence doctrine.

C. *Legal History and Comparative Civil Law*

While "the precise historical origins of the doctrine of consideration are not entirely clear",[141] Ibbetson shows that the core idea of reciprocity is long-standing and deeply embedded in the common law. In medieval times informal contracts (not accompanied by formalities) were enforceable only if they were reciprocal: the debtor must have received something in exchange. In the course of the 14th and 15th centuries, the shift towards liability based on the undertaking ('assumpsit') signified a change, at least one service as to the type of transactions the courts would enforce. However,

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[138] Goetz & Scott, *supra* note 54 at 1304; Robert A. Prentice, "Law and Gratuitous Promises" (2007) U. Ill. L. Rev. 881 at 894. According to Posner, *Gratuitous Promises*, *supra* note 54 at 417, extralegal sanctions are 'economically superior alternatives to legal enforcement'.

[139] *Ibid*. at 1304.

[140] Hugh Collins, *The Law of Contract*, 4th ed. (London: Lexis Nexis Butterworths, 2003) at 48.

[141] *Gay v. Loh*, *supra* note 5 at para. 98.

enforceability "was articulated in terms of an idea of reciprocity, *quid pro quo*, and the opposition between formal and informal contracts was aligned directly with the opposition between gratuitous and reciprocal agreements".[142] The exchange view has long been the very essence of enforceable contracts.

The oft-made claim that abolition of consideration would bring English law more into line with civilian legal systems[143] does not withstand closer scrutiny. French and German law *appear* to enforce a much wider range of promises than English law. But, appearances can be deceptive. In practice, civil law draws essentially the *same* line between gratuitous undertakings and reciprocal undertakings.[144] Civil law defines enforceable contracts to include gratuitous ('unilateral') undertakings *but* subjects them to a stringent formality requirement unless they are 'synallagmatic' (i.e. consist of bilateral reciprocal undertakings).[145] In a mirror image, the common law requires consideration (bilateral reciprocation) unless a gratuitous promise satisfies stipulated formalities requirements.[146]

Four points of contrast between common and civilian law show that, if anything, it is civilian law which is more hostile to gratuitous transactions. First, the civil law requirement of notarisation is far stricter than the common law requirement of deed.[147] Under French law a donative promise is normally enforceable to its full extent only if both parties execute the promise in writing before two notaries,[148] who must warn and advise the parties of their rights and duties under the instrument.[149] Second, while the notarisation requirement only applies to wealth which is 'giveable',[150] it is required not only of promises but also *transfers* of such wealth.

Third, the civil law recognises special excuses (derived from Roman law) for the non-performance of gratuitous transactions. These include: the donee's "gross ingratitude"[151] (including serious misconduct towards the donor or a close relative, infidelity of the donee spouse, filing an unmeritorious petition to declare the donor disabled), the donee's failure to perform an express condition, the donor's deterioration of circumstances such that "he is not in a position to fulfil the promise without endangering his own reasonable maintenance or the fulfilment of obligations imposed

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142 David J. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999) at 80.

143 Burrows, *Law of Obligations*, *supra* note 4 at 196-198; Beatson, *supra* note 54 at 125.

144 See John Dawson, *Gifts and Promises: Continental and American Law Compared* (Yale: Yale University Press, 1980); Arthur von Mehren, "Civil Law Analogues to Consideration: An Exercise in Comparative Analysis" (1959) 72 Harv. L. Rev. 1009.

145 *German Civil Code* (*Bundesgesetzblatt*), §§ 320-326 [*German Civil Code*]; *French Civil Code* (*Code civil des Français*), art. 1102 [*French Civil Code*].

146 See Reinhard Zimmermann, *The Law of Obligations* (Oxford: Oxford University Press, 1996) at 504-505: "[T]o define the scope of donation, the German Code is using here, under negative auspices, what has traditionally been, in a positive version, the essential test for the enforcement of promises in the English common law; the absence of any agreed-upon recompense characterizes donations in Germany, the presence of bargain consideration provides the normal reason for enforcing a promise in England."

147 Dawson, *supra* note 144 at 227.

148 Or one notary and two witnesses: see Dawson, *ibid*. at 69.

149 Art. 931 of the *French Civil Code*. See Dawson, *ibid.* at 68-69; Zimmermann, *supra.* note 146 at 500. On the need for notarisation under German law, see § 518 of the *German Civil Code*; Zimmermann, *supra* note 146 at 501.

150 Meaning some interest (tangible and intangible) which can be reduced to an ownership that the gift can divest and transfer: see Dawson', *ibid.* at 54-68.

151 § 530 (1) of the *German Civil Code*; Arts. 953 and 955 of the *French Civil Code*.

upon him by law to furnish maintenance to others,"[152] and the subsequent acquisition of a child by a previously childless donor.[153] Even completed gifts are revocable in comparable circumstances.

Lastly, with mixed transactions (containing elements of gift and exchange), the German courts have undertaken the extraordinarily difficult task of dissecting the fused transaction so that gifts do not escape control.[154] The common law courts have not applied the concept of bargained for exchange with such extreme thoroughness and vigour. Dawson comments that "if bargain consideration is a blight, as some contend, then in Germany the malady is virulent and deep-seated".[155]

Dawson concludes that the civil law's enforcement of gratuitous promises is 'fragile':

> [I]t is seldom that much is invested in such arrangements, either by the participants themselves or by legal agencies when called on to enforce them… [O]rdinarily such arrangements are readily dissolved at the will of either party and the care and diligence required of the promisor in his own performance are much reduced. In most of the situations that have lead to litigation (promises to supply free transportation or medical care), a promise would usually add little to the duties that the enterprise itself would generate. So I conclude that our law has suffered no real loss by withholding from the ties that bind so lightly the descriptive title contract and in attributing to the law of torts whatever redress is needed.[156]

VI. Conclusion

Phang J.A. rightly cautions against substituting one troublesome doctrine with another. Lord Steyn expresses the prevailing attitude: "I have no radical proposals for the wholesale review of the doctrine of consideration. I am not persuaded that it is necessary. And great legal changes should only be embarked on when they are truly necessary."[157] I have argued that:

(i) Serious intention to be bound is a necessary but not sufficient condition of legal enforcement. Not all seriously intended promises are or should be enforced.

(ii) The consideration doctrine does not simply perform the functions of formality; it is not simply a proxy for serious intention to be bound.

(iii) The consideration doctrine cannot be replaced by the vitiating factors of duress, undue influence and unconscionability. The suggestion that it *can*, is based on two erroneous assumptions: that consideration is just evidence of serious intention to be bound, and that the vitiating factors relate to the negation of this serious intention. Moreover, contrary to what

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[152] § 519 of the *German Civil Code.*

[153] See further Dawson, *supra* note 144 at 53.

[154] *Ibid.* at 196.

[155] *Ibid.* at 227.

[156] *Ibid.* at 55 and 222-223.

[157] Lord Johan Steyn 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 L.Q.R. 433 at 437.

Phang J.A. said, undue influence and unconscionability will rarely apply to commercial contracts.

(iv) Likewise, promissory estoppel cannot substitute for consideration because it concerns a distinctive head of liability (induced reliance rather than purchased expectation) although it arises in the context of contracting.

(v) The consideration doctrine expresses the appropriate boundary of state involvement by drawing the line between enforceable promises which are explicitly conditioned on reciprocation, and unenforceable one-sided promises. The former supports cooperation and coordination between strangers who would not otherwise transact. The latter expresses the concern not to subvert valuable domestic and social relationships, which is the natural home of gratuitous promises. Transactions in the social domain are presumed to be unenforceable even in the presence of consideration.

(vi) The major sources of discontent with the consideration doctrine (uncertainty and apparent inconsistency in the conception of 'value' and the uneven application of consideration as 'practical benefit') are surmountable by "modification of the present rather rigid view of what kind of benefit constitutes a sufficient consideration".[158] Recognition of this in the context of contract formation, contract modification, and elsewhere[159] would inject a much needed dose of realism without deviating from the core idea of contract as the exchange.

[158] Patrick Atiyah, *Essays on Contract* (Oxford: Clarendon Press, 1986) at 241-2.

[159] For example, option agreements.