

## COMMENT

### CONSIDERATION RECONSIDERED CONSIDERED

By M. P. ELLINGHAUS\*

#### 1

In this book<sup>1</sup> Professor Sutton argues that consideration is the means by which we 'distinguish between promises which are enforceable in law and those which are not'<sup>2</sup>; 'that the proper approach to consideration is to regard it in terms of sale or the price paid for the promise'<sup>3</sup>; that promises which are not supported by consideration in this sense should not, however, be excluded 'mechanically and dogmatically', but should be regarded as potentially enforceable by way of exception:

In such a case, the problem of whether there is consideration for a promise or not becomes a decision in terms of a choice of social policies, a determination to sanction certain conduct as desirable and to discourage other conduct as unworthy of support.<sup>4</sup>

Cases in which the need for making an exception is established include those covered by the so-called 'minor' reforms proposed by the English Law Revision Committee of 1937. The law should be amended accordingly by legislation, it being 'far too late in the day to achieve any worthwhile reform through judicial means'<sup>5</sup>.

[I]n addition it should be provided, *ex abundanti cautela*, following the lead set in the United States, that any agreement modifying or discharging an existing contractual obligation should be binding without consideration. This would mean the recognition of promissory estoppel and moral obligation as bases for the enforcement of promises, the acceptance of the validity of an offer declared to be 'firm', and the recognition of a *jus quaesitum tertio*. So far as promises of gratuitous services or gifts were concerned, their binding effect would depend entirely on whether they could be brought within the promissory estoppel situation as envisaged in the Second Restatement of Contracts. If this were not possible, the formality of a deed would be required to render them binding. If these reforms were carried out, the common law would not be too far removed from the civil law in the types of promises to which it gave recognition, a result which is eminently to be encouraged.<sup>6</sup>

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<sup>1</sup> Sutton K.C.T., *Consideration Reconsidered*, (1974), i — xxxvii, 1-282. Hereafter cited as 'Sutton'.

<sup>2</sup> Sutton 3.

<sup>3</sup> *Ibid.* 33.

<sup>4</sup> *loc.cit.*

<sup>5</sup> *Ibid.* 264.

<sup>6</sup> *Ibid.* 262-3. Of course the book amounts to much more than this. Rather more than half of it is given over to the most extended treatment yet of 'promissory

## 2

In Ernst Junger's novel *Heliopolis* there is a quasi-mythical place, the Burgenland ('land of castles'), which has in the course of time become a sort of inner space in the imagination. 'So much memory had accumulated there that finally its weight broke through to present reality, and the storehouse grew unimportant before the treasure which it contained; it became invisible, like the cave Sesame. This explains why mention of the Burgenland has almost become metaphorical . . .'<sup>7</sup>

## 3

C: Concerning your discussion of formations — ashtray, vase — structuralists believe that what we signify is a function of how we signify it. Are you at all interested in the structuralist method?

S: Certainly, but they repeat something that's become almost a banality, because when the physicists started diving into the atomic microcosms, they said: All we can say is determined by what we can measure with our instruments, so we're constantly describing the abilities of our measuring instruments and, finally, we really don't know what it is; all we know is what our instruments are. The means of analysis are all we can talk about, which finally means that we're always talking about ourselves — the matrix of our brain which has produced the tools to penetrate into aspects of existence. But the tools are just prolonged brains or arms. So we're constantly talking about the possibilities of ourselves when we describe something. And then again, the subject-object contradiction of the classical antinomy is dissolving because when I speak about the object, I'm really speaking about my speaking about the object. Only when I stop identifying with myself do things become exacting . . .<sup>8</sup>

## 4

In these notes I equate 'law' with 'legal sanction'. For my purposes this imprecise equation is adequate, though of course for other purposes it is not.

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estoppel' (the *High Trees* doctrine), including a survey of analogous doctrine in the United States. (A further recent account of the Australian position is to be found in Seddon, 'Is Equitable Estoppel Dead or Alive in Australia?' an unpublished paper delivered to the AULSA Conference, Melbourne, 1974). The rest supplies the substantial underpinning of the arguments I have here extracted in outline. If I were writing a review in the ordinary way I should certainly be at fault for not giving a more comprehensive account of the book. But it will presently become obvious that I have not here set myself the task of writing such a review, for which in any case I should be underequipped.

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<sup>7</sup> Junger, *Heliopolis* (1949) 360. Sutton quite rightly gives only a brief summary of the history of consideration, relying, more prosaically, on a familiar sentiment: 'The common law develops, but not by looking back to an assumed golden age': Sutton 4-12. (The quotation is from Windeyer J's opinion in *Coulls v. Bagot's Executor and Trustee Co. Ltd.* (1967), 119 CLR 460, 496). Atiyah is more precisely in point: 'The truth is that the Courts have never set out to create a doctrine of consideration. They have been concerned with the much more practical problem of deciding in the course of litigation whether a particular promise in a particular case should be enforced.' Atiyah, *Consideration in Contracts, A Fundamental Restatement* (1971) 7. In the history of concepts as in that of art the discernment of unifying principle is largely retrospective.

I should like to add that a sufficient reason for not being detained by the history of consideration is that it is long, tedious, and a matter of dispute.

<sup>8</sup> Cott, *Stockhausen, Conversations with the Composer* (1974) 152.

The topic is the legal enforcement of promises. By this is meant simply the application of legal sanctions — in whatever form — as a result of an 'action' (in the widest sense) asserting that a promise was not performed.

## 5

Consideration, one is told, is that which distinguishes legally enforceable promises from those which are not. One is accordingly tempted to identify the issue at stake as a jurisdictional one — to what extent is a given promise subject to law? — and hence to see the role of consideration as specifically jurisdictional in character.

But whether a given promise is legally enforceable is by no means settled by reference to consideration alone: as everybody knows, the range of potentially relevant criteria is enormous, and is in fact at least co-extensive with the reach of contract law itself. Contract law focuses on breach of promise. It can be viewed as a polytheistic<sup>9</sup> aggregate of doctrines setting out the circumstances in which a legal sanction is available in respect of such a breach. That is, it amounts, *as a whole*, to a map of enforceability. The so-called doctrine of consideration is a microcosmic constellation of criteria (perhaps organized around a subcentral point of gravity — 'bargain') by reference to which *some* limits of the territory can be charted.

It is not conducive to clarity to fix on consideration as *the* embodiment of the rule that not all promises are legally sanctioned, as *the* 'dividing line',<sup>10</sup> as *the* criterion used 'to distinguish between promises which are enforceable in law and those which are not'.<sup>11</sup> The jurisdiction of law in matters of promise is delineated by the law of contract as such; no one of its components can be meaningfully singled out as jurisdictional in function.

This seems to me a vital point. Those who will not hear of the abolition of the doctrine of consideration often show themselves forgetful of it. '[T]o talk of abolition of the doctrine of consideration is nonsensical . . . Nobody can seriously propose that all promises should become enforceable; 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'.<sup>12</sup> What is nonsensical here is the grossly inflated importance given to consideration, the implication that it forms the sole bulwark against the wholesale enforceability of all promises.

<sup>9</sup> Its polytheism still seems worth emphasizing, at any rate in the Anglo-Australian context. Cf. Kessler & Sharp, *Contracts, Cases and Materials* (1953) 1.

<sup>10</sup> McGarvie, Pannam & Hocker, *Cases and Materials on Contract* (2nd ed. 1971) 67.

<sup>11</sup> Sutton 3. Innumerable similar formulations are, of course, scattered throughout the literature.

<sup>12</sup> Atiyah, *op.cit.* 60.

## 6

The real status of the doctrine of consideration lies, rather, in the fact that it constitutes, by an overwhelming consensus, the 'logical' first response to the question 'what promises are enforceable?' It is seen as a point of departure, as providing the means of some sort of *initial* classification of promises in terms of twin categories, the legally relevant and the legally irrelevant.

The nature of this initial classification is certainly elusive at first glance. Is there in fact an issue peculiar to consideration which sets it apart as an initial classifier, making it different in this sense from its companion arbiters of jurisdiction? Certainly this issue cannot be satisfactorily located in some distinction between 'formation' and 'discharge'. In the first place, such a distinction begs the question: why not start with discharge? In the second place, consideration is not the only item to be listed under the heading 'formation': besides 'offer' (and, insofar as it is meaningfully distinguishable from consideration itself, 'acceptance'), consider misrepresentation, mistake, duress, illegality, capacity — a list potent enough to render implausible also any alternative argument that consideration is at any rate the most dominant member of the family.<sup>13</sup>

## 7

There is a central imprecision about many discussions of consideration. It is nicely illustrated by the quotations from Sutton given at the beginning. He asserts that 'consideration is . . . the price paid for the promise'. (I think the elision is fair). In exceptional cases, however, 'the problem of whether there is consideration . . . or not becomes a decision in terms of a choice of social policies . . .' In this second assertion (and in others like it) 'consideration' is clearly not used in the sense of 'price paid for the promise'. The decision in terms of social policies which has to be made in exceptional cases is not whether a price was paid; almost everybody nowadays (and certainly Sutton) concedes that none was. The word 'consideration' here means something else, something like 'good reason for legal enforcement'. So when we ask (inelegantly) whether past consideration is good consideration, we are not asking whether past consideration is the price for the promise — obviously it can only be so regarded by way of extravagant 'construction' — but rather (to put the point negatively) whether the absence of 'present' consideration is a reason for non-enforcement.

This second meaning almost certainly reflects the earliest stages of the

<sup>13</sup> In fact, consideration in its concentration on *response* to the promise typically arrives later on the scene than the others. In any case, the distinction between formation and discharge has a certain elusiveness in a conceptual world in which 'Implied Condition' gestures always in the wings; as, for instance, in the traditional debate about the theoretical basis of 'frustration'.

first used the word 'consideration' they meant no more than that there was a 'reason' for the enforcement of a promise'.<sup>14</sup> Whether this suggestion is precisely correct or not, it is in any case clear that 'consideration' was for a considerable time allowed to function as an open category, free of limiting definition, allowing space for the plausible intrusions of the future.

Suppose we take a large brush and say that the subsequent history of consideration has consisted in the substitution for the meaning 'reason for enforcement' the new meaning 'only acceptable reason for enforcement' — which of course implies necessarily a resort not merely to definition but to *limiting* definition. To resort to *limiting* definition is the first gesture of the pragmatist, and we all know that the genius of the common law resides in its pragmatism. But the earlier usage still resonates perceptibly, as we have seen. Occasionally it rises to the level of explicit paradox: consider, for example, the tag 'past consideration is no consideration'.

## 8

A similar opacity haunts the corridors of the house itself. Take a modern and sufficiently centralist statement of the doctrine of consideration:

Firstly, a promise is not enforceable (if not under seal) unless the promisor obtains some benefit or the promisee incurs some detriment in return for the promise. A subsidiary proposition . . . is sometimes put forward, namely that consideration must be of economic value. Secondly, in a bilateral contract the consideration for a promise is a counter-promise, and in a unilateral contract consideration is the performance of the act specified by the promisor. Thirdly, the law of contract only enforces bargains; the consideration must, in short, be (and perhaps even be regarded by the parties as) the 'price' of the promise. Fourthly past consideration is not sufficient consideration. Fifthly, consideration must move from the promisee. Sixthly . . . the law does not enforce gratuitous promises.<sup>15</sup>

Of these propositions, only the third and sixth — which are really one, since 'bargain' and 'gratuity' are normally thought of as a duality covering the spectrum — stipulate directly that a promise is enforceable only if a

<sup>14</sup> This seems at first sight imprecise in its apparent confusion of 'reason for enforcement' with 'reason for the promise'. Cf. Fifoot, *History and Sources of the Common Law* (1949) 396: 'the judges, once they had evolved a comprehensive remedy for all parol contracts, looked about them for some single expression which might denote the grounds upon which it would lie. "Consideration" had been used by lawyers for a hundred years, but in the merely general sense of reason or motive. This word they now appropriated to their current purpose and invested with particular significance'. But the distinction between the reason for the promise and the reason for enforcement seems not to have been pursued with the zeal of modern times; rather there was a conceptual fusion, as St. Germain demonstrates: 'if his promise be so naked that there is no manner of consideration why it should be made, then I think him not bound to perform it: for it is to suppose that there were some error in the making of the promise'. (Extracted in Fifoot, *op.cit.* 327). See also Gilmore, *The Death of Contract* (1974) 18-19.

<sup>15</sup> Atiyah, *op.cit.* 6; footnotes omitted. I have also left out (a) a parenthesis which is contentious, but in any case not vital, neither for present nor (I think) for Atiyah's purposes; and (b) a seventh proposition relating to the *High Trees* doctrine, which is (rightly) given the status of an 'exception', and might therefore be thought of, in the present context, as more a matter of scope than of definition.

price has been paid. The remainder, as conventionally viewed,<sup>16</sup> are only indirectly, if at all, dedicated to this proposition; rather than state it, they assume it and follow out its supposed implications.

To put it in another way: proposition 3/6 puts forward a primary criterion of initial enforceability, the rest implement it by setting out the secondary criteria which determine whether the primary criterion has been complied with. These secondary criteria are concerned with the internal hygiene, express the morality, of bargain. They make up our 'theory' of bargain; one hesitates to speak of 'definition', since so much resides merely on the threshold of explicitness or is the subject of controversy.

Consideration is, therefore, not so much a melange (as has often been asserted<sup>17</sup>) as an ambidexter. Its 'external' role is to assert the segregation of bargain from the rest ('gratuity'). Its 'internal' role is to map out the native contours of the territory of bargain.

Of course the two roles are inseparable; the former makes the latter indispensable, the latter makes sense only in light of the former. But the former is fundamental, the point of departure, the hierarchical apex. Its status in this respect is concealed, however, by lumping the propositions representing both roles together in an undifferentiated equivalence. As a result the point of departure has received a disproportionately meagre amount of scrutiny, and has often been ignored altogether.

## 9

The next gesture of the pragmatist is the creation of an exception. And in this, too, the common law has kept consistent faith with its animating creed.

At the stage of initial delimitation it is perhaps still possible to argue fundamentals. At the stage of exception, however, this begins to be seen as unpragmatic, for the more urgent issue is whether the exception should be allowed, and, if so, how it should be formulated. Thus inquiry turns on itself. As a result the debate about consideration has largely been about exceptions — whether they exist, and to what extent, and whether more are necessary. Sutton's book conforms with this convention; in his view more *are* necessary. Inevitably the exceptions show some tendency to swallow up the major thesis. To list in statutory form all the exceptions

<sup>16</sup> At least the first proposition has also been seen as setting up a rival primary criterion. I accept here, however, the view that 'bargain' has by large consensus established itself as the dominant rationale — see Sutton 13-33 — with the result that the benefit/detriment principle has meaning, if at all, only as a secondary criterion. Atiyah, in choosing to regard the requirement of 'economic value' as 'subsidiary' to it, seems to agree.

<sup>17</sup> See, e.g., Sutton 33, note 82.

subscribed to by Sutton would certainly produce a difficult slab of prose.<sup>18</sup>

## 10

And there is, of course, no end to exceptions — so much is inherent in the process; at any moment that 'choice of social policies' may have to be made in relation to a new claim for special treatment. This is not to set one's face against reform; on the contrary, it is to ask for a more radical kind of it. The debate should shift from the exceptions to the major thesis, where it has only infrequently resided.

It is not difficult to see why the proliferation of exceptions is preferred to the assault on principle. Despite Atiyah's recent valour — 'Consideration means a reason for the enforcement of a promise'<sup>19</sup> — the possibility of a general return to early usage seems remote. The reason for this is not simply that narrower meanings (and especially the bargain formula) have become entrenched. It lies in the fact that the earlier usage implies at once a measure of chaos. Presumably it was superseded on precisely this ground. Few lawyers can, for obvious reasons, bring themselves to feel at home with so unmediated a resort to 'choice of social policies', no matter how buttressed with the rhetoric of 'flexibility'.<sup>20</sup>

Actually, of course, resort to definition-plus-exceptions is no less an excursion into residual vagueness. Whether in the given case there is ground for making an exception is as much a matter of 'social policies' as is the question whether there is 'reason for enforcement'. But there is a *feeling* of solidity about the former question at which further inquiry baulks gladly.

While the law swings between these two poles, no progress is being made. Where metatheory should be there is only a void. Of course, metatheory demands metametatheory, and ultimately there is only the 'violin in the void'.<sup>21</sup> But certain levels of theory give little room for movement; there is relief in enlarging the exercise yard. To create space the fundamental issue has to be disinterested.

## 11

The metatheoretical issue is: why 'bargain' as primary criterion?

<sup>18</sup> The 'minor' recommendations of the English Law Revision Committee of 1937 yield, in the Committee's own summary, seven not very lapidary paragraphs. The *Second Restatement of Contracts* is hardly more concise.

<sup>19</sup> Atiyah, *op.cit.* 60; author's emphasis.

<sup>20</sup> Cf. Sutton's disarming assertion that 'flexibility, enabling justice to be done, is today recognized as more important than certainty': 197. I do not wish to imply that 'social policies' ought to be put aside: as everybody knows, they cannot be, since they are part of the general (and therefore the decider's) conditioning. The law is obliged to work in terms of conditioning; there is no use in looking for transcendental inspiration — transcendence belongs elsewhere, and is certainly incompatible with sanction.

<sup>21</sup> A lapse of a fastidious style — see Nabokov, *Invitation to a Beheading* (1959).

A large variety of reasons have been put forward, and in fact a number of virtues of the bargain requirement have been brought to light. It seems proper, however, to regard most of them as incidental. The central virtue is not difficult to identify (and has, of course, frequently been identified): it is that of reciprocity, of exchange, and it has undeniable advantages. Let it be remembered that the doctrine of consideration requires not merely that there be a 'bargain promise', that is, a promise conditional on the payment of price, but that the condition so set has been complied with, that the price has been paid.<sup>22</sup> (This notion should not be thought of as emasculated by the — after all relatively late — recognition of the 'bilateral'; for what is conferred on the promisee, by virtue of that recognition, is not merely 'the promise' but a right of action for its non-performance). And once I have done my part, the justice of my claim to the other's seems self-evident: the whole point of my acting was to obtain that specified something in return. The transaction was one of *exchange*; that was the creature brought into being. And the right to reciprocity is simply a constitutive component of that creation.

To support the enforcement of paid-for promises on this basis<sup>23</sup> is, of course, uncontroversial, indeed banal (so long, at any rate, as 'common understanding' is willingly allowed its place in the scheme of things). But the bargain requirement is used not merely as a reason for, but as one against, as an *excluder*: and here it seems to exceed the bounds of its rationale.

## 12

It suffers as well from a sort of inbuilt self-contradiction. If consideration requires not merely that the promise be scrutinized as made, that it set a price, but also that there be the requisite response, its payment, then there is a sense in which the doctrine can be regarded as distinguishing among bargain promises, as sorting out those which have merely been made from those which have elicited the stipulated response. And consideration distinguishes among bargain promises according to the cliché that a promisor is bound in conformity with the terms of his promise. As a maxim of justice this amounts perhaps to a comforting abjuration of caprice, and takes its place as one strand in the contrapuntal scheme according to which it 'is of the essence of contract, regarded as a class of

<sup>22</sup> In other words, 'bargain promise' has to be distinguished from 'bargain'. The former is the first half of the whole which is the latter, and as such precedes enforceability; the law enforces bargains, not bargain promises. I use 'bargain promise' in this sense throughout.

<sup>23</sup> One may add, in anticipation of discussion to follow, that bargain promises are typically made in a context relatively unsaturated by any ethos of private sanctioning, and involve in any case so high a potential of dispute (presumably because the posture of reciprocity inherent in bargain implies from the start no more than a conditional ceasefire) that the intervention of law is prototypically warranted.

obligation, that there is a voluntary assumption of . . . duty'.<sup>24</sup>

But if a man is bound according to his promise, why should he *not* be bound, why should consideration be found lacking, in cases where no condition of exchange has been set? — when the case is, say, one of a promise conditional on the occurrence of an event, or of a promise unconditional altogether?<sup>25</sup> Here the doctrine of consideration insists that a man shall *not* be taken at his word, has therefore to adduce some mediating qualification, and naturally incurs the stresses which attend the service of a plurality of masters.

## 13

There is here the claustrophobic savour of a major premise unexamined. Suppose the *prototype* is conceived of not as promise, but as bargain: '[T]he fundamental and pervasive theory of the common law of contract is that of a bargain between two parties . . . This statement is of course subject to several qualifications: for *one of the peculiarities* of our law of contract is that it *also* enforces promises which are outside a classical bargain-setting. But these qualifications, however important by themselves, *are marginal from the point of view of a general contract theory*'.<sup>26</sup> '[C]ontract in any legal system may be based on the principle *either* of promise *or* of bargain'.<sup>27</sup>

The prototypical principle will then be something like 'consideration, which must be present for enforceability, is compliance with the condition of exchange'; and all promises with respect to which compliance with a condition of exchange cannot be shown are, *ipso facto*, unenforceable. Naturally a promise which states a condition other than that of exchange, or none at all, falls into this category.

But it is rather peculiar to say of promises which do not set a condition of exchange that they are vitiated by non-compliance with such a condition. 'Sort out the flags according to whether they are green or red'. This gives no clue as to what to do with those of other colours.

It is instructive to quarrel with the common law thesis that bargain, and not promise, is central 'from the point of view of a general contract theory'. To make an *antithesis* of bargain and promise is false, surely. For pur-

<sup>24</sup> *Australian Woollen Mills Pty. Ltd. v. The Commonwealth* (1954), 92 C.L.R. 424, 457. I have omitted the words "a legally enforceable", which are ominous with circularity.

<sup>25</sup> I omit all allusion to the category 'conditional gift promise'. The distinction between exchange and conditional gift, though repeated to the point of axiom, seems to me highly problematical.

<sup>26</sup> Stoljar, *Prevention and Co-operation in the Law of Contract* (1953) 31 Can. Bar Rev. 231. The emphases are mine, and I have run text and footnote together.

<sup>27</sup> Fifoot, *op.cit.* 398; my emphases.

poses of contract — which has, by common consent, left *barter* behind; the uniqueness of which lies in its penetration into, acquisition of, the future, of which more below — for the purposes of contract bargain *is* promise, a species of promise: that conditional on exchange (the condition, moreover, having been complied with 27a). Among modes of *transfer* it is possible to strike antitheses: that, for instance, of transfer by exchange on the one hand, transfer by violent appropriation on the other (though even here there are those . . .). But bargain, in any sense in which it can be asserted to be the 'fundamental and pervasive theory of the common law of contract', can only be a participant as much of promise as of exchange: it lies, in fact, at their intersection.

We might perhaps have had a pure law of exchange, but we do not; and certainly not as long as the focus is on bargain.

## 14

'The function of the faculty of promising is to master [the] darkness of human affairs and is, as such, the only alternative to a mastery which relies on domination of one's self and rule over others'.<sup>28</sup> This is a large claim, a moral theory<sup>29</sup> of promise in embryo, centring on an assertion that promise is an essential human capacity, implying the need for its preservation (as we might seek to preserve the capacity of sight if there loomed some threat of its extinction).

To utilize promise is certainly not to conquer the future, which remains intractable. But promise gives us courage to act in the face of that intractability — or at any rate induces us to act in spite of it. It bestows 'the capacity to dispose of the future as though it were the present, that is, the enormous and truly miraculous enlargement of the very dimension in which power can be effective'.<sup>30</sup> It is perhaps a dimension analogous to that which harbours our trust in the 'elements': we walk, swim, and (latterly) fly, because ground, water and air promise us their support. We are more mobile, less fearful, as a result of promise.

## 15

By means of promise we *create* the future. Promise is action (even when we speak of 'promise to oneself' — but this may, in any case, be left aside for present purposes); but, more important still, it begets action:

<sup>27A</sup> See note 22 *supra*.

<sup>28</sup> Arendt, *The Human Condition* (1959) 219-20.

<sup>29</sup> I use the word 'moral', and the phrase 'moral theory', as indicating that an 'ought', a recommendation to action, is being offered — an ought purporting, moreover, to be based neither on wishful thinking nor on oracular tradition, but on insight into the nature of things. (And I prefer to say 'based on' — an obscurity, admittedly — rather than, say, 'derived from', for the obvious reasons).

<sup>30</sup> Arendt, *op.cit.* 220-1.

and it is that action which acts in the future, and so makes it into the present — since action can take place only in the present.<sup>31</sup>

Our need to create the future may truly be postulated as innate and implacable. Let us tritely remind ourselves: a future left entirely uncreated implies complete surrender to chance, and a degree of 'faith' not displayed, so far as I know, by even our most accomplished mystics.<sup>32</sup>

There are other ways of creating the future, both one's own and that of others. But promise is a relatively civilized means of doing so. Action out of promise is qualitatively better, more comprehensive, more 'efficient', than action out of, for instance, subjection by command which is usually devoid of creative attention, and inhabits only the limits pre-scribed.

## 16

It seems probable that promise was a painful accomplishment.<sup>33</sup> Its position is in need of reevaluation. To confer on promise the catalytic status implied by such an act of primary scrutiny savours, it's true, of anachronism. This is mainly due to the now advanced mechanization of the contracting process. Goods and services are overwhelmingly produced and sold by depersonalized aggregates in a quasi-monopolistic environment. The individual has become a 'consumer'. Printed standard forms set out unilaterally their terms of supply in the language of promise, which has, as a result, become as debased as has the language of divine wisdom in the mouths of pulpiteering hypocrites.

It is, of course, nonsensical to allow a sort of tyranny to establish itself in the name of promise. Nonetheless there is no reason for its abandonment; it can be seen to survive, just as wisdom can dimly be seen to survive in the face of its proclaimers. The 'meaning' of contractual obligation can still be located in promise, although our concept of the language by which it is carried is in need of radical revision. Promise resides no longer in the printed form, but in its transactional and relational<sup>34</sup> context. But this proposition can only play a transitional role here and must await elaboration at another time.

## 17

The potency of promise as a mode of creating the future is obviously

<sup>31</sup> Compare the concept 'presentation', as expounded in Macneil, 'Restatement (Second) of Contracts and Presentation', (1974) 60 *Virginia Law Rev.* 589 — which tends, however, to caricature in its too strenuous insistence on the telescopic effect of promise.

<sup>32</sup> But which lives on the level of fantasy: in the fable of the indolent under the fig-tree, in the German 'Schlaraffenland', and in other utopias.

<sup>33</sup> See, e.g., Farnsworth, 'The Past of Promise: An Historical Introduction to Contract' (1969) 69 *Col. Law Rev.* 576.

<sup>34</sup> See Macneil, 'The Many Futures of Contract' (1974) 50 *Calif. Law Rev.* 691. Macneil's work — see also note 31, *supra* — is of great interest in the present connection; I have been unable to give it the attention for which it calls.

not confined to the bargain context; hence its status — that of a human 'faculty', a way of being human — is not adequately measured in terms of price. Surely it is overwhelmingly evident that *some* unpaid-for promises are as 'deserving of' legal sanction as any that have been paid for: to point to non-payment in their case is to arouse an anguish of butts.<sup>35</sup>

## 18

To speak of legal sanction as 'deserved' by promise implies a view of their relationship which I here assume rather than seek to establish. Law amounts to a further twist of the screw: it is possible to think of that twist as decisive in one sense or another. Obviously this issue arises not merely in relation to law and promise, but with respect to law generally, and has as such exercised the centuries. It seems to me that such issues can be resolved only by action; a lawyer printing in a law journal is not writing for the theatre of masturbation (the therapeutic potential of which I don't, however, wish to dispute).

'It is hard to imagine a society where the fulfilment of some kinds of promise is not enforced by the sanctions of the state'.<sup>36</sup> This stock soldier, in his traditional lawyer's garb of inelegance, must do sentry duty here.

## 19

In any case, consideration — in whatever guise — is surely now dead of suffocation. There comes the point in the history of every construct, especially in that of mansions of grandeur, when the inconveniences of inhabiting it begin to outweigh the comforts. In the case of consideration the 'materials' have grown beyond ordinary management. And we cannot rely on those who have the gift and the patience to master such a labyrinth, for their reports on emerging are conflicting. Moreover (probably), 'there is never all this talk about tradition until it has ceased to exist'.<sup>37</sup>

I think it is overwhelmingly clear that we need a new start. Sutton is surely right to dismiss the possibility of judicial reform as having passed, and to call for legislation,<sup>38</sup> but his proposal is not to start afresh, but to maintain the established pattern by legislating into existence an elaborate series of 'exceptions' — in other words, to engage in elaborate patchwork. The characteristics of patchwork are a look of untidiness and the continued visibility of the corpus. We need a new corpus (on which patches will, of course, in due course reappear — *c'est la vie*).

<sup>35</sup> I leave for elaboration at another time a tempting notion that, in any case, *all* promises are paid for, that promise is inherently exchange-oriented; for present purposes this would attenuate the concept 'price' beyond useful application.

<sup>36</sup> Roebuck, *Law of Contract* (1974) 1; which gives, however, the more bracing views of Charondas and Plato also.

<sup>37</sup> Forster, *Abinger Harvest* (1967) 106.

<sup>38</sup> Sutton 264.

Naturally it is idle to hope for an entirely new beginning. Legal doctrine has always a past as well as a future. Nor is there much hope of producing, with a stroke of the pen, the sort of hallucinatory clarity which we are taught to venerate as ideal. There is no certainty in law: there is no certainty in *thought*. But it is something to order back, for a time, the encroachments on one side, thus giving us breathing space to consider some of the other borders of contract, on which, after all, there have for some time appeared unmistakable signs of conflagration.

We need an act of great simplification, a central printed formula which will at the very least provide a discrete specimen as the object of primary scrutiny, and relegate the rest to a secondary level of importance. There have been cases of such legislative simplification in which right from the beginning the past has flooded irresistibly into the new present. The risk of this ought to be somewhat guarded against by express injunction. But above all the encroachments of the past can be kept at bay by tapping the right source.

## 20

'The basis of [the rule that not every promise made will be enforced by the courts] lies no doubt in the dictates of common sense, for it cannot be supposed that any legal system would put such an intolerable burden on its citizens or courts as to render enforceable any promise no matter how, when, where, or why made'.<sup>39</sup> The 'intolerable burden' must be that of a *large* increase in litigation. To suppose all promises legally sanctioned is to imagine the country filled with harrassed promisors, the courts besieged by harrassing promisees, the legal process clogged.

This is highly unconvincing. The enforceability in issue here is not, after all, that of the criminal law: no-one suggests that we employ a police force to search out promise-breakers. By 'enforceability' is meant here 'liability to legal sanction at the behest of the private litigant'. And how often have the floodgates opened at *his* touch?

Our experience so far has seemed to show that the creation of new heads of liability or the expansion of existing ones is in the first place the *result* of persistent litigation, and only secondarily and in a minor way an incitement to it. Few men would sue the recalcitrant dinner guest even if they could; by and large the promises which are not already the cause of litigation will continue to elude the law. On the other hand litigants will not cease from testing for weak spots until their plausible claims are accommodated.

<sup>39</sup> Sutton 3. The sentiment is widespread. Cf. Atkin LJ: 'All I can say is that the small Courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligation'. *Balfour v. Balfour*, [1919] 2 KB 571, 579.

To argue that this state of affairs is due precisely to the prescriptions which define the ambit of legal sanction is surely to wear lawyer's blinkers. Sanction is potent not only in the realm of public authority; our private lives are saturated as much by sanction as they are by promise. *That invitation won't be repeated. And our behaviour towards the man will be perceptibly cooler when next we meet.*<sup>40</sup>

## 21

Promise does not lack the element of compulsion. On the contrary: its capacity for begetting action consists precisely in its resort to will, to compulsion.<sup>41</sup> Promise is 'domination of one's self' — in this respect Arendt's formula is in need of amendment. It is an assumption of responsibility for the future, 'given' to another (for our purposes; though one's promises to oneself involve an 'other' as well, and are an exact 'internal' equivalent to the 'external' phenomenon under discussion). It is an invitation to that other to hold the promissor responsible, in other words to exact a sanction, if performance fails.

Promise and sanction are inseparable; promise is an appeal to sanction; sanction is a defining component of promise. *Promise is self-sanctioning.* I do not mean, of course, that a sanction is always exacted in a case of non-performance (even in such a minimal sense as 'guilt'): but non-performance has, at any rate, to be *excusable*.<sup>42</sup> (The specific legal echo here is the doctrine of 'frustration').

## 22

But we may now seem to have exposed a dilemma comprising terms other than those of expediency. At stake is the interaction of two spheres of sanctioning: the private, inherent in the act of promise itself, and the public, law-mediated and applied from the outside. ('Private' and 'public' are very approximate, of course). And it is difficult, after all, not to feel that there is a legitimate distinction to be preserved here, no matter how elusive of definition it might prove.

## 23

Here, if anywhere, is the 'logical point of departure'. The *first* task of any problem-solving technique ('consideration', or any surrogate) is to

<sup>40</sup> The argument from expediency is not merely unrealistic; it is peculiarly sterile. It invites resort to arbitrariness ('the line must be drawn somewhere') and explains in this guise at least to some extent the dogged adherence to traditional canons of consideration so often displayed in case and comment.

<sup>41</sup> I skirt here the complexities of the psychology of will in favour of informal approximation; it seems worth noting, however, that promise may rank prominently among the techniques of modulation from a first to a second 'realm' of will: see Farber, *The Ways of the Will* (1963) 7-25.

<sup>42</sup> The notion that promise is self-sanctioning is reflected in the conventional contraposition of 'legal' and 'moral' obligation. '[A] line has to be drawn between

establish its relationship with other techniques addressed to the problem(s) in question — since the first challenge of such a technique must be that it creates no more difficulties than it conquers.

## 24

More precisely, is there some slow strangulation of the private 'morality' of promise, of promissory justice, to be guarded against? At first sight it is tempting to think so. To transform a 'moral' duty into a legal one is, it has often been argued, to deprive it of force: hence the businessman who thinks of conformity to the contract description as a matter not of promise but of safeguard against litigation will, as a result, look to the chances of evading such action (which are, after all, often considerable) as the measure of his performative conduct.<sup>43</sup> Are the spheres of private and legal sanctioning yoked together in a mobile relativity, so that the advance of the one forces the retreat of the other?

It is difficult to imagine that such a question could be made to yield to the methods of the laboratory, or even of the quasi-laboratory. Rather it constitutes an invitation to a sort of metaphysics — an invitation which no lawyer should on that account refuse, travelling — as he is by profession — in a conveyance riddled on all sides by metaphysical crossfire. (Besides, metaphysics is 'merely' self-observation, and not at all abstruse: why should we accept the conditioning according to which only telescopes and microscopes, not to speak of questionnaires, are not the handmaidens of obscurantism? For they are not, after all, *that* simple to wield, as their practitioners — on the other hand — do not refrain from implying. And simpler tools may be quite close at hand).

## 25

Promise (it has been argued) is self-obligating; to promise means to assume obligation at the risk of sanction, even if only in the sense of 'obligation to excuse non-performance'. Law, on the other hand, tends — in terms of the Arendtian conception — to fall on the side of mastery by

those promises which are binding in conscience only and those which the law will seek to uphold': Sutton 254. Compare Lord Denman's refutation of Lord Mansfield: reliance on moral obligation as a test of enforceability 'would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it'. *Eastwood v. Kenyon* (1840), 11 Ad. & El. 438, 450-1.

<sup>43</sup> Compare Lord Atkin's resistance to the notion that a separation agreement ought to have legal status: 'The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts'. *Balfour v. Balfour*, [1919] 2 KB 571, 579.

'domination' and 'rule'.<sup>44</sup> It is, after all, a commonplace of our jurisprudence that obligation based on promise is different from that 'based on law'.

Where there is conflict in conception it is tempting to infer a corresponding conflict in fact, to see rival processes of sanctioning as contesting the occupation of a given territory. And to the extent to which the law prevails in such a conflict the viability of promise seems impaired. For even though the legal obligation is based on promise, the latter has suffered a loss of meaning: self-sanctioning has, if it has not given way to, at least coalesced with, the sanctions officially imposed. Law seems so much more powerful than promise; it seems as if by overfrequent draughts of it we impair the 'moral' constitution as by a sort of intemperance. Result: the flight of substance and its replacement by the vacant form, already amply evident in the current modes of exchange, according to which, for instance, an 'exclusion clause' may render wholly indistinct the profile of a relationship still formally cast in terms of promise.

The question in the given case then seems to be: is the diminution of promise by intrusion of legal sanction a price worth paying?

## 26

There is, however, an alternative and I think more plausible line of reasoning: 'Codes of law . . . do not usually contain injunctions to do or refrain from things that people would do or refrain from in any case . . . [T]he function of such codes is to provide people with motives for doing what they would otherwise not do'.<sup>45</sup>

If this remark is not taken to be a comprehensive summation of the function of 'codes of law' (obviously an attempt at such a summation would have to contain much more), it seems to embody a truth of exact relevance to the question being examined. Its burden is that legal sanction occupies territory which 'moral' action has vacated, or where it has never resided, of its own accord; legal sanction does *not* dispossess moral sanction.

Whatever may be the case in certain other areas,<sup>46</sup> this proposition seems accurate in the field of promise. The cases that come before the

<sup>44</sup> The antithesis may be softened, but not, I think, eliminated, by resort to the familiar metaphor of social contract.

<sup>45</sup> Nowell-Smith, *Ethics* (1954) 211. The same may be said, of course, of 'moral codes'; I have obscured the author's explicit recognition of this fact — here irrelevant — by elision.

<sup>46</sup> The issue, it has to be remembered, is one of *withholding* legal sanction, since we began with an assumption that promise falls at least to some extent into the sphere of law: text accompanying note 36, *supra*. If it were one of *intruding* legal sanction, the argument, although apparently still about interacting systems of sanctioning, would have to be conducted differently: e.g. censorship, sexual behaviour, divorce, drugs (with regard to all of which a similar assumption would at once be subject to challenge).

courts demonstrate by their very existence the failure of private sanctioning not merely in their specific contexts, but on a larger scale. We easily find categoric labels for them; note how 'traditional' the controversies of consideration are; the paths are all well-beaten, either in fact or in predictable potential.

27

True, a dadaistic avant-garde is liable to make its occasional appearance: if the disappointed host has not yet sued his renegade guest, he soon will. In such a case it *may* be possible to argue that the withholding of legal sanction will make a positive contribution. But the weapons reserved for such occasions need be only small calibre — even a strap or cane might do.

28

Better, in any case, to distinguish between private and legal spheres of sanctioning in less elevated terms. One thinks of the child who has been deprived of his toy or a promised outing, and who falls into a rage or lamentation wholly disproportionate to the loss: he must be taught, in the end, to accept the world as it is. So the irate host encounters law as an official therapy of disillusionment.

Or is the issue one of aesthetics? Imagine a box with two compartments, intended for chess pieces. We sort out the white from the black, though not to do so would hardly interfere with the playing of a game; we do so, perhaps, in allusion to a first act of consciousness, the perception of form.

Or, the last resort, is it merely that we must start *somewhere*?

29

Obviously a certain point has been reached here. If a scheme of initial classification of promises can be rooted neither in expediency nor in 'morality', then, from the point of view of law (our chosen blinkers), the issue is trivial, marginal, even esoteric.

*Even if all promises were initially classified as 'enforceable':* that is, if we abandoned the quest for an initial overall classification altogether, and resorted merely to the development of specific patterns in response to specific problems, *chaos would not be unleashed* — neither in terms of physical workload nor in those of 'moral decay'. So large is the circumference of the balloon 'consideration', so swollen is it with our heated exhalations, that we have forgotten the thinness of its fabric, its susceptibility to the pin-prick. The problem of an initial classification of promise as 'enforceable and 'unenforceable' *needs above all to be radically deflated.* We should free ourselves from it to get on with more important, or at any rate less trivial, matters of concern, in which the law of contract is not lacking. We should perhaps consider the 'oncoming generations

[who] are threatened with an endless and issueless vista of unfruitful polemics'.<sup>47</sup>

## 30

To abandon consideration-bargain is to re-root ourselves in promise, to give up a false antithesis. The civil law, which has never needed such a reorientation, landed instead in 'intention' and its inevitable paraphernalia. The common law, too, has resorted of late to a requirement of intention — an 'intention to enter into legal relations'. This is, of course, presently conceived as a requirement *additional* to that of consideration, but has been variously proposed as a substitute for it (and resisted as such).<sup>48</sup>

The notion that a promise ought to be legally enforceable if it was intended to be, and not otherwise, has at first a self-recommending intelligibility about it; but its utility is nonetheless highly questionable. In the first place, there is a convincing case to be made for the wholesale abandonment of 'intention' simply on the ground that it is an impossibly *crude* tool in the analysis of secular transactions. It has long been jettisoned as such almost everywhere else; the law seems to be its last stronghold. The objections to it are well-known, and need no canvassing here.<sup>49</sup>

But above all, the perspective imposed by 'intention' is in the present context an impossibly limiting one, since it allows an unworkably large scope to the 'subjective' factor. One does not deny that the promisor's (or even the parties' 'joint') articulated intention should be considered relevant. But it should determine the issue only where no opposing feature of the context is found to be of greater importance. If the civil law requirement of *causa* is in fact substantially a test of intention,<sup>50</sup> its concomitant 'objective' emphases on formality, unjust enrichment, duress, and good faith, are also instructive.

## 31

An initial classification of promise of the kind at stake here can obviously be achieved only along certain lines. If we really want such a classification, certain large degrees of specificity will have to be sacrificed. 'Bargain' and 'intention' are as narrow in scope as they are amorphous in content.

<sup>47</sup> Stone, *Legal System and Lawyers' Reasoning* (1964) 123.

<sup>48</sup> See, e.g., Sutton 195-7, 254-8.

<sup>49</sup> They amount, in the end, to a *fatal* lack of 'certainty' and on that ground Sutton opts — after some hesitation — to do without 'intention': 258. Precisely this unwieldiness of the concept has blinded some commentators to the fire (of consideration-bargain) beneath the pan, and they have leapt accordingly: e.g. Hamson, 'The Reform of Consideration' (1938); Hepple, 'Intention to Create Legal Relations' (1970) *Cambridge L. J.* 122.

<sup>50</sup> Sutton 250-4; cf. 54 *Law Quarterly Review* 233 also Cheshire & Fifoot, *Law of Contract* (3rd Aust. ed. 1973) 64.

What is needed — if anything is needed — is, in fact, an 'illusory category', a major premise which, 'since it does not yield any one necessary answer by the syllogism, both invites and compels the court to an answer based on evaluation, conscious or unconscious, of the social situation confronting it'.<sup>51</sup> Suppose a rule as follows (which assumes that the doctrine of consideration has been explicitly abolished):

A promise may be legally unenforceable if the intervention of law as such is inappropriate in the circumstances.

Such a formula amounts, in essence, to a focussing device: it exposes as the question (perhaps not very felicitously) the relevance of 'the intervention of law as such'. To focus is already to take a first step: a steering mechanism is identified and taken in hand, although the direction which movement should take is as yet uncertain.

There is no need here to defend the use or establish the utility of such 'illusory categories': the job has been done.<sup>52</sup> This is the place only for claiming the peculiar aptness of such a category for the task here confronted. That aptness rests on two assumptions, which I have tried to expose: one that, contrary to assertions and an aura of discussion which ascribe to consideration a role and status of Atlassic dimensions, the problem is a relatively marginal one, and that the sector in which 'illusoriness' is to operate is therefore comfortably pocket-sized; two, that the terrain under scrutiny is in shadow and resists the conventional mapping strategies (such as those of 'expediency' or 'morality'), and that there is therefore a legitimate scope for unusual liberties of creative exegesis. The formula suggested is intended at one stroke to dispense with the need for specific reforms such as those advocated by Sutton. Claims to the enforcement of promises to accept lesser sums, promises made in exchange for the performance (or a promise to perform) extant duties, claims by third parties — there is nothing in any of these (or the others), once the requirement of consideration is explicitly abandoned, which suggests that the intervention of law is *as such* inappropriate.

32

One should, I think, offer an apology for writing on consideration, even if one's object is to suggest a means of terminating the debate (at least in its present form). At first sight there seem to be even among academic

<sup>51</sup> Stone, *op.cit.* 241; I would expand this slightly by omitting the word 'social'.

<sup>52</sup> *Ibid.* 25-6, 235-241. Stone perhaps attends insufficiently to the fact that 'illusoriness' is a matter of degree, as I have attempted to show by isolating the 'focussing' element of the formula suggested in the text. For a current and undisguised resort to 'illusory category' in present context, see Restatement (second) of Contracts, § 89A (Tent. Draft No. 2, 1965) which attempts to deal with the problem of 'past consideration' by providing that a 'promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice' (my emphasis).

pursuits,<sup>53</sup> many with a greater claim to attention than the common law of contract. I will attempt a justification by relying on the Cohens' observation that:

if the diversity of theories of contract is startling, one may find equal cause for wonder and reflection in the fact that thinkers and societies that are poles apart geographically, economically, and culturally, so often agree on specific rules of contract law . . . [B]asic contract rules equally valid in France, Chile, Colombia, Germany, Holland, Italy, Mexico, Portugal, and many other lands, and equally honoured across eighteen or more centuries, offer a substantial challenge to the view that law reflects all the changes of changing economies and all the diversities of diverse civilizations. The spectacle of Pollock describing English common law by quoting whole paragraphs from a German scholar's description of the law of ancient Rome raises a real problem for those who think, with Holmes, that the common law is 'not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified'.<sup>54</sup>

In other words, there may be something at stake which is shared, 'essentially human' — and for me the 'faculty' of promise (and all that it implies) is the only such something in sight. But my justification is not that this *is* so, but that it may be so ('theory', one remembers, is also 'conjecture'). An opposite mood is often as powerful:

Cook on — the law will never jell,  
and theories pass — like the moon's phase.<sup>55</sup>

(The law professor as poetaster: transfigured among shifting metaphors and dashing dashes. But, to be noted also, a desperate lurch of aspiration: the extravagant invocation of a great natural law — or was that a rhyme for 'maze'?)

### 33

We write endlessly about 'consideration', and the rest. But one can do so only in the knowledge that what is being said is not 'the truth'. Few of us would openly claim to know the truth, certainly not in matters of law. What the right attitude to consideration is, none of us can say with total conviction. We can only point out to each other that this account commits these errors of logic, that one those of omission of relevancies, that only one approach has been considered — *etcetera*.

But the language of debate not only fails to cater to the requisite nuances, but rests formally on the notion that we *can* — perhaps by debate — establish the truth.

This makes for a split in the personality of the lawyer, especially that of the academic lawyer. Only by playing the role of lawyer can he conjure

<sup>53</sup> But then this is cowardice in itself. A book, said Kafka (and 'publication' seems well within the embrace of the remark) 'should serve as the axe for the frozen sea within us'. (Quoted in Alvarez, *The Savage God* (1971) 204. Who among us . . .?)

<sup>54</sup> Cohen & Cohen, *Readings in Jurisprudence and Legal Philosophy* (1951) 101.

<sup>55</sup> Llewellyn, 'Ballade of the Class in Contracts', in *Put in his Thumb* (1931) 39-40.

violin out of void, but the role-nature of the role is difficult to suppress from consciousness.

Or perhaps it is not difficult to suppress it: perhaps it has become the exquisite art of the lawyer to suppress it so well that its residue is now only in the conventions of legal speech: 'it seems', 'it is submitted', 'with respect', *etcetera*. Hamlet has been dead five hundred years, but as lawyers we have not yet acquainted ourselves with his story.

Life is serious. We're all going to die, for a start, not to speak of all the other (and some perhaps even more immediate) problems. One should ('it seems') be as aware as possible of what one is doing. I feel a certain self-consciousness in engaging in the traditional modes of 'scholarship', an uncomfortable failure to identify with my chosen role. There can be no virtue in the suppression of this consciousness: it exists. There seems to be point in giving expression to it in the house of 'scholarship' by way of explicit prelude or postscript, rather than by the faint humming counterpoint which can often already be found notated invisibly 'between the lines'.

34

you  
would have faltered, too  
what remains  
but the cosmetic metaphor, now  
that the laureate modes  
are stowed away in attics?  
write about law schools  
that's where we *spend* our lives, after all  
though eros passes only in  
the wings, it's true  
nonetheless the coda needs a green note  
the green note of another drowning, let it  
sound its horn in the bush