CONSIDERATION AS THE COMMITMENT TO RELINQUISH AUTONOMY

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I. INTRODUCTION

> "Under the existing legal system no legal relation is deemed contractual in the absence of certain voluntary acts on the part of two contracting parties. What acts are those which will cause society to come forward with its strong arm?"[1]

To be enforced, bargain promises must be supported by consideration. As a consequence, consideration tests the divide between "freedom *from* contract" and contractual obligation.[2] The full significance of the rule's location at this threshold of enforceable exchange, however, has been obscured by a long tradition reifying the requirement as "something given in exchange." The importance of consideration as a meaningful act, not a thing, committing a person to exchange has been inadequately developed. The relevance of consideration as a means to establish grounds of liability for promise has been lost. Instead, consideration has been treated as a troublesome and unnecessary appendage to the contract doctrine and common links between enforceable promises and other forms of liability for civil and criminal wrongs have been ignored.

Understanding consideration as a form for the relinquishment of autonomy forces a reconceptualization of what consideration does. Rather than a senseless, illogical, historical anomaly that should be abolished by judicial decision or legislation,[3] the gathering of act, intent, and

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[1] Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 170 (1917).

[2] *See* Richard E. Speidel, *Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1306 (1994) (stating that "if the negotiating parties have not crossed the formation line, they have a 'safe harbor' within which they are free from contract") (footnote omitted).

[3] *See, e.g.*, Clarence D. Ashley, *The Doctrine of Consideration*, 26 HARV. L. REV. 429, 435-36 (1913) (finding consideration a technicality that should be abolished by legislation if it cannot be abandoned by the courts). Henry Winthrop Ballantine, *Is the Doctrine of Consideration Senseless and Illogical?*, 11 MICH. L. REV. 423, 424 (1913), countered Ashley's proposal with faint praise for the doctrine by arguing that it was "not a very successful attempt" to establish reciprocity as a ground of enforcement. Nevertheless, scholars who have found the doctrine senseless and illogical are not hard to find.

nexus of inducement compressed in consideration doctrine emerges as a means of attribution comparable to the more familiar requirements in torts or criminal law. Consideration establishes grounds of responsibility for bargain. As such, it functions not trivially to ban enforcement of promises which should be enforced, or merely formally as a cautionary or evidentiary means to assure promises are seriously intended,[4] but foundationally to construct in everyday acts of exchange the social relation of autonomy on which the economic and social life of a market society depends.

Roscoe Pound thought consideration was an anachronism grown out of the exigencies of medieval procedure that should be done away with because of its unhappy results. *See* Roscoe Pound, *Individual Interests of Substance—Promised Advantages*, 59 HARV. L. REV. 1, 38 (1945). Lord Wright also thought the doctrine's development an "historical accident" reflecting "fictions and evasions," "which ought to find no place in our system of contract law." *See* Lord Wright, *Ought the Doctrine of Consideration be Abolished from the Common Law?*, 49 HARV. L. REV. 1225, 1227, 1252 (1936). The English Law Revision Committee of 1937, of which he was Chairman, issued its *Sixth Interim Report*, Cmd. 5449, which was sharply critical of the illogic and inconvenience occasioned by the doctrine but in the end recommended reform rather than abolition. During the same period in the United States, Malcom P. Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783, 795 (1941), worried that the authority of the rational profession of law might be impaired by doctrine that laypersons could little understand or respect. Also, Malcolm S. Mason, *The Utility of Consideration—A Comparative View*, 41 COLUM. L. REV. 825, 847 (1941), found the relationship between consideration and the rules of formality that alone could justify its existence "inharmonious and unbalanced." More recently, Charles Fried found the doctrine anomalous and too internally inconsistent to offer any alternative to his own theory of promise as a foundation of contractual obligation. *See* CHARLES FRIED, CONTRACT AS PROMISE 35 (1981). Proposals to abandon the doctrine have come from James D. Gordon III, *A Dialogue About the Doctrine of Consideration*, 75 CORNELL L. REV. 987, 1003-06 (1990) and *Consideration and the Commercial-Gift Dichotomy*, 44 VAND. L. REV. 283 (1991). He considers the doctrine to reflect "irrational rules from centuries long past," and proposes a rule instead that would enforce commercial but not gift promises. Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903, 930-47 (1985), propose a revision of RESTATEMENT (SECOND) OF CONTRACTS § 71, to the same effect. Similarly, Mark B. Wessman, *Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45, 47-48, 52 (1993), and *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713 (1996), finds the doctrine "superfluous" and productive of more harm than good. Moreover, he too would abandon it, although, he acknowledges, if the gatekeeper of consideration is to be fired, someone forgot to tell the judges.

[4] *See* Mason, *supra* note 3, at 831; *see also* Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 450-51 (1987) (asserting that consideration is a formality, like seal, that identifies an intention to be bound). Professor Farnsworth has concluded that consideration has become a "mere technicality," and a paternalist one at that. Farnsworth quotes Holmes's observation that "consideration is as much a form as seal," and he adds "[i]t seems more accurate to treat it as a 'technicality' than a 'formality.'" *See* E. Allan Farnsworth, *Promises to Make Gifts*, 43 AM. J. COMP. L. 359, 366 n.31 (1995).

Using the techniques of critical or scientific realism,[5] this essay proposes to explain the doctrine of consideration as an expression of a mechanism for the relinquishment of autonomy. Insofar as it shows how and why the requirement of consideration exists, it constitutes a challenge to widespread attacks throughout the last century on the necessity or coherence of this doctrine. To the extent it argues that consideration involves a requirement of substance—a commitment to relinquish autonomy—it constitutes also a challenge to prevailing contemporary interpretations that suppose to explain the rule as a function of the form of bargaining only. Additionally, insofar as it distinguishes between a mechanism for the relinquishment of autonomy and other mechanisms involving, for example, reliance or modification, it provides a basis for evaluating proposals for reform. Moreover, it also explains why fashionable calls for abolition of the doctrine have been strikingly ineffective while other reform proposals, notably RESTATEMENT § 90 and UCC § 2-209(1), have met with success.[6] Similarly, applications assumed to be more or less incoherent under traditional explanations can be given straightforward and consistent interpretation.[7]

By way of overview, Part II explores the conditions presupposed by the operation of the doctrine of consideration. The form of argument used here is retroductive. The use of this approach, basic to scientific practice, suggests the need for me to frame my argument as a tentative of social science. This is done in Part III where I make clear the orienta-

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[5] Critical realism is a form of scientific realism presented by Roy Bhaskar in A REALIST THEORY OF SCIENCE (2d ed. 1978) [hereinafter RTS]. The consequences for social science were developed in his THE POSSIBILITY OF NATURALISM (2d ed. 1989) [hereinafter PON], again in SCIENTIFIC REALISM AND HUMAN EMANCIPATION (1986) [hereinafter SRHE] and were elaborated further in RECLAIMING REALITY (1989) [hereinafter RR], PHILOSOPHY AND THE IDEA OF FREEDOM (1991) [hereinafter PIF] and other works. Andrew Collier gave an exposition of Bhaskar's ideas in CRITICAL REALISM: AN INTRODUCTION TO ROY BHASKAR'S PHILOSOPHY (1994), and Andrew Sayer develops implications for the methodology of social science in METHOD IN SOCIAL SCIENCE (2nd ed. 1992). William Outhwaite compared critical theory, hermaneutics, and critical realism in THE NEW PHILOSOPHIES OF SOCIAL SCIENCE (1987), and Peter T. Manicas reviewed the history of social science from the perspective of critical realism in A HISTORY AND PHILOSOPHY OF THE SOCIAL SCIENCES (1987). Social scientists who have taken up critical realism include: TREVOR PATEMAN, LANGUAGE IN MIND AND LANGUAGE IN SOCIETY (1987); SYLVIA WALBY, THEORIZING PATRIARCHY (1990); and RICHARD WALKER & ANDREW SAYER, THE NEW SOCIAL ECONOMY (1992). In the field of law an appeal to Bhaskar's critical realism has been offered by Valerie Kerruish in her study of Hart, Finnis, and Dworkin in JURISPRUDENCE AS IDEOLOGY (1991). In the study of criminal law, Alan Norrie has applied critical realism to an analysis of theoretical approaches to criminal justice in *The Limits of Justice: Finding Fault in the Criminal Law*, 59 MOD. L. REV. 540 (1996).

[6] *See infra* Part IV.A.2.

[7] *See infra* Part IV.B.3.d.iii (discussing the analysis of "attempted exchange").

tions on which I rely. Part IV identifies and analyzes the mechanism underlying the doctrine of consideration and locates this mechanism in a structure of social relations I characterize as relations of "interdependent autonomy." In doing so the analysis shows how, as a matter of individual agency, promises may become the subject of legal obligation and why, as a matter of social reproduction, they do come to form an institution of social and economic importance. On this foundation it is possible to establish which promises, as a matter of attribution and personal responsibility, may be fairly enforced against individuals who promise. Part V establishes the boundaries of inquiry by showing limits to the bargain mechanism and provides also a brief conclusion.

II. A RETRODUCTIVE ARGUMENT FOR CONSIDERATION

Retroduction begins with a constellation of phenomena to be investigated and asks what must be the case in order for such things to be possible. It asks what conditions must be presupposed to account for the existence of the object of investigation.[8] "How are [scientific] experiments possible" is a way in which the English philosopher Roy Bhaskar makes use of the transcendental form of retroductive argument to explain the ontological foundations of critical realism.[9] A retroductive argument searches for the circumstances out of which a thing emerged. Significantly, this may be at different depths or levels of reality in the way in

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[8] *See, e.g.*, Ernan McMullin, *The Case for Scientific Realism*, *in* SCIENTIFIC REALISM 8 (Jarrett Leplin ed., 1984). McMullin argued that retroduction "has come to be recognized as central to scientific explanation" and explains it as the practice of proposing a model of structures, often hidden, unobserved or unobservable, whose properties allow it to account for the phenomena singled out for explanation. *See id.* at 8. The realist's objective, he explained, is modest: realism looks to "past historical sequences and asks what best explains them" *See id.* at 34. But the realist holds that the model-structure's ability to account for phenomena we experience, especially insofar as the explanatory power of the structure improves in accuracy, tends to ground a fallible ontological claim: "that the model-structures provide an increasingly accurate insight into the real structures that are causally responsible for the phenomena being explained." *See id.* at 30.

[9] *See* COLLIER, *supra* note 5, at 31-41 ("most of the leading ideas of transcendental realism are rooted in a single transcendental argument which answers the question 'how are experiments possible'"); *id.* at 20-29 (providing an introduction to the critical realist's use of transcendental argument). In PON, *supra* note 5, at 50, Bhaskar explained that "transcendental arguments are merely a species of which retroductive ones are the genus"—both interrogate the conditions of the possibility of a thing. Because of his appeal to transcendental argument, Bhaskar has also called his approach "transcendental realism." *See* RTS, *supra* note 5, at 42 ("Thus whereas transcendental realism asks explicitly what the world must be like for science to be possible, classical philosophy asked merely what science would have to be like for the knowledge it yielded to be justified."); *see also* PON, *supra* note 5, at 4-9 (asking, after the fashion of Kant, what must be the case in order for a set of phenomena to be possible and a possible object of knowledge for us).

which the underlying mechanism of gravitational attraction explains the movement of the tides. A retroductive argument retraces the steps of emergence of a thing back to a foundation and then from that foundation to the foundation of the foundation and so on in the ongoing inquiry of science.

A retroductive argument concerning consideration would ask what the world must be like in order for the doctrine of consideration to be possible. In synopsis, an answer might run as follows: the world presupposed must be a world of promises, for consideration emerges as a means to demarcate enforceable from unenforceable promises. But promises have not always played a significant role in legal life.[10] Roman law, for example, never developed a general basis for enforcing the reciprocal exchange of promises.[11] Some promises when exchanged could be enforced, but there was no general social rule recognizing an obligation to enforce mutual promises. This phenomenon emerged only in market economies developed to the point where the general circulation of goods and services had become a basis for production. We may suppose promises to exist in all forms of human existence and interchange,[12] but

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[10] *See, e.g.*, LON L. FULLER, *The Role of Contract in the Ordering Processes of Society Generally, in* THE PRINCIPLES OF SOCIAL ORDER 169, 182 (Kenneth I. Winston ed., 1981) (stating "[i]t is a commonplace of anthropology that explicit contractual arrangements are a rarity among primitive peoples."). E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 576 (1969), observes that in WILLIAM GOLDING, LORD OF THE FLIES (1954), that the island's schoolboys did not "bargain for the exchange of each other's promises." He continues "[i]n this their experience mirrors that of man as a whole, who has shown little concern with such matters for most of his quarter of a million years existence." Farnsworth *supra* at 576.

[11] *See, e.g.*, ALAN WATSON, THE LAW OF THE ANCIENT ROMANS 58 (1970) ("Roman law . . . has no general theory of contract but a number of different contracts."); *see also* Farnsworth, *supra* note 10, at 590 ("But neither the innominate nor any of the other enforceable contracts resulted in the development of a general basis for the enforcement of promises that would include a promise made in exchange for another promise, where there had been no formalities and no return performance.").

[12] *Cf.* Samuel Stoljar, *Promise, Expectation and Agreement*, 47 CAMBRIDGE L.J. 193, 204 (1988):

> In this light, again, it is difficult to imagine a so-called "prepromising" (or non-promising) society. It is not that we could simply assume away the concept of promising; for if we did what would become of the related concepts of intending or expecting, how would it make sense to make future arrangements? Can there be a human society in which people do not know what it means to declare intention or recognize expectations, do not plan things to be done for or with another? Promises, it is therefore clear, are as basic in our conceptual equipment as are other notions that articulately orient us toward the future. So an often cited remark, attributed to Holmes, to the effect that promises were invented when the future was invented, contains a solid grain of truth, even if at first sight it seems little more than a literary exaggeration.

the promises presupposed by consideration are of an historically specific rather than general character. They are promises formed and shaped by the world of private exchange. A vassal promises fidelity to a lord, but this is not a promise which gives rise to RESTATEMENT (SECOND) OF CONTRACTS § 71.[13] The universe of promises with which we are concerned includes only those which presuppose private exchange.

Private exchange itself presupposes people distributed in identifiably specific kinds of social relations. People in all forms of social life give goods back and forth, but this need not involve private exchange in the sense of a reciprocal transfer of goods or services between persons formally independent of one another.[14] Exchange within status or kinship societies remains subordinate to kin and status relationships.[15] Private exchange emerges when the members of a society function as formally independent units for the production and distribution of wealth. The family farm of the early United States is an archetype of such independence—a self-sufficient household unit producing the bulk of its own means of survival, but tied to the market for certain essentials. Yet the paradigm extends as well to the working family today—such a family is completely dependent on the market; it finds employment and all goods and services of which it has need in the market and its members enter market relations as autonomous economic units.

Market economies emerge where autonomous individuals or groups exchange specialized production they do not need for goods and services they do need. Where produced wealth is held autonomously and exchange between private possessors becomes a regular interaction, a tendency for the production of each to become specialized is accentuated. If the process is repeated under circumstances favorable to its development,

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[13] *Cf.* P.S. ATIYAH, PROMISES, MORALS AND THE LAW 92 (1981) ("The idea that a person could alter his legal relationship with others merely by his free choice is a feature of advanced legal systems.").

[14] *See* Farnsworth, *supra* note 10, at 578-82 (discussing the self-sufficiency of the Ammassalik of Greenland, sharing among the Zuni of New Mexico, and the potlatch of the Indians of the Pacific Northwest—all societies which did not rely on exchange based on bargain); MARCEL MAUSS, THE GIFT 5 (1990):

> In the economic and legal systems that have preceded our own, one hardly ever finds a simple exchange of goods, wealth, and products in transactions concluded by individuals. First, it is not individuals but collectivities that impose obligations of exchange and contract on each other. . . . Moreover, what they exchange is not solely property and wealth . . . . Such exchanges are acts of politeness: banquets, rituals, military services, women, children, dances, festivals, and fairs in which economic transaction is only one element, and in which the passing on of wealth is only one feature of a much more general and enduring contract.

[15] *See* Farnsworth, *supra* note 10, at 582 (showing the dominance of kinship by the fact that bargaining becomes a basis for becoming part of a kinship group).

a more or less fully integrated system characterized by a social division of labor develops. Each individual or separate economic unit becomes dependent upon exchange for things they have come to need and exploits the skills and resources each has as a means to obtain the things each needs. In this fashion the system generates a tendency for its own reproduction,[16] and the intensity of this tendency is heightened the more deeply entrenched private exchange becomes. The more people have become dependent on the perpetuation of exchange for the satisfaction of their needs, the more the social division of labor develops. Reciprocally, with every advance in the social division of labor, the force for its reproduction becomes stronger and more consolidated. Thus, these two features characterize a private-exchange economy: the private autonomy of person and property and an interdependence generated by the social division of labor. I will refer to this structure of social relationships as a relationship of "interdependent autonomy."

This is the social foundation. From here we can reverse the path of our retracing. If there are to be both private autonomy and the social division of labor, then there must be private exchange. Private exchange makes possible the reproduction of the one and the other and the one with the other. I teach and offer my services as a teacher and am paid in return with a token representing a command on anything any other person or persons has produced. I am able to live without the skills to produce food, shelter, or clothing. A municipal bus driver develops skill in providing transportation services. The person who farms devotes herself to farming. In each case, specialized skills exercised autonomously generate a product exchanged for goods and services capable of meeting some portion of the totality of a person's needs. In this way private autonomy and the specialization of activity persist and are socially reproduced.

Private exchange gives rise necessarily to promising. With promises, goods can be delivered before payment or payment can be made before goods are supplied. The exchange of products is facilitated by arranging for exchange before the items contracted for are even produced. A producer can devote more time to production and make that time more efficient if she is sure of market outlet. As it develops, therefore, private

[16] I use reproduction in the sense of a material and social process that assumes individuals acting in particular ways in relationship to things and to each other. As such, it is a social process that includes (at least) a material dimension of action, (causing the world to be other than it would otherwise be) and a social dimension of structured relations among people, including an expressive dimension of meaning always present in the things people do. I argue that exchange is a social relation that plays an essential role in the process of social reproduction. The act of exchanging goods and services is a consequence of autonomy and the social division of labor. But the act of exchange recreates the conditions for these social relations to be once again constituted.

exchange generates a need for promising and the institution of promising tends to be transformed accordingly.

But in the context of private exchange, promising presupposes more. While promising involves cooperative activity of persons over time, because each person serves his or her own interest, each looks, in the transaction of exchange, to self-interest. Self-interests, however, change.[17] Drought causes a crop to fail and makes performance of a contract to deliver grain impossible. If a person's promises are to be performed or the harm caused by nonperformance redressed, the promisor will sooner or later have to be compelled to comply. Along with the production and exchange of goods and services, we need to consider institutions of coercive compliance. In other words, a developed system of private exchange presupposes a developed system of law. Private exchange in and of itself is not enough to reproduce a system characterized by private ownership and the social division of labor; the exercise of social coercion is also necessary if reproduction of social relations in this form is to be assured.

The forms for the exercise of coercion are driven by the need to reproduce the underlying structure of private ownership and the social division of labor.[18] For example, before public coercion is used to enforce

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[17] *Cf.* Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 377 (1980):

> By hypothesis, a party enters a contract when it believes that no greater benefit can be derived by expending elsewhere the resources required for the contract performance. Events between the time of formation and the time of performance may prove this belief to have been erroneous. Before its own performance is rendered, a party with a losing contract may seek to recapture foregone opportunities to the extent possible. This can be accomplished *only* by redirecting the resources committed to the promised performance and therefore by failing to perform the promise.
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> A buyer of corn, for example, may fail to perform a contract for future delivery for a large number of reasons. If the market price falls the buyer will wish to recapture the opportunity of buying on the spot market or on a changed futures market. If the buyer gets a hot tip on the potato market, it may wish to redirect purchase money earmarked for the corn contract to enable it to purchase more potato contracts. If investor confidence in the commodities market slips, the buyer may wish to move its business into stocks or real estate or may wish to go out of business. These and other uses for the resources committed to the initial corn contract may be opportunities necessarily foregone when entering the corn contract.

E. ALLAN FARNSWORTH & WILLIAM F. YOUNG, CONTRACTS, CASES AND MATERIALS 1 (5th ed. 1995) introduces students to the idea of contract by reference to cotton farmers less than eager after harvest to carry through with forward contracts made before planting; a $.50 per pound change in the market price provided the incentive to see self-interest differently from before.

[18] I limit my attention to the formal exercise of coercion in law. Informal pressures in exchange are significant, of course. See Stewart Macaulay's classic study, *Non-*

any particular exchange, it is essential for there to have been a surrender, whether by word or act, of that formal independence from others given by the social form of private autonomy.[19] My decision to exchange or not is my own. I am driven implacably to exchange by the dependence of my needs upon it; this is a social fact, the consequence of a system of social relations I experience as given. Nonetheless, there must be choice in where and when and under what conditions I intersect with others if exchange is to reproduce private autonomy; there must be an expression of willingness to submit oneself to exchange. Other forms of social interconnection are possible, obviously: one person can make use of others without their consent as in various forms of bondage; alternatively, members of a group can transfer goods among themselves cooperatively. But these are not social forms characteristic of a private-exchange economy. Where promises are reciprocally given within the context of private-exchange, each participant must bargain for the performance of another and obtain the consent of the other for whatever is received. It follows that in giving consent each manifests a willingness to give up his or her autonomy to that extent. This is a necessary implication of what a private exchange economy is. The prohibition of theft reflects the same dynamic: as a nonvolitional transfer of goods within the framework of private exchange, theft is inconsistent with the reproduction of private autonomy. Exchange presupposes a volitional commitment to autonomy appropriate to the reproduction of the social relations of private autonomy and the social division of labor. In Anglo-American law the legal doctrine that fulfills this function is consideration.

III. CRITICAL REALISM

The analysis that follows turns on a distinction between the events that fill legal life—judicial decisions, enforcement, legislation, and the conduct of parties within the framework of legal rules—and the social structures or mechanisms that cause such events. Distinctions between generative structures and the events they cause are fundamental to the critical realism of Roy Bhaskar. While this is not the place for an exposition of the substance and methods of Bhaskar's approach, nonetheless, before proceeding I need to provide an orientation to those essential principles on which I rely.[20] In so doing, I will assume not only Bhas-

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Contractual Relations in Business: A Preliminary Study, 28 AM. SOC. REV. 55 (1963).

[19] The independence is formal only because persons are dependent on one another as a consequence of the social division of labor.

[20] Sayer, *supra* note 5, at 5-6 offers "signposts regarding the nature of realism," including that the world exists independently of our knowledge of it; that our knowledge is fallible and theory-laden; that the objects of scientific investigation have ways of acting or causal powers reflecting relations of material necessity; that the world is differentiated

kar's realism, but also his naturalism, that is, the thesis that natural and social sciences can be studied in a common way.[21] This does not mean there are not significant differences in method that obtain, for in the last analysis the form of any science is determined by its object of study. But I assume a commonality of approach in explaining the open, stratified, and differentiated character of both the natural and social worlds.

First, while all forms of realism assert the existence of the object of study independent of our thinking about it,[22] critical realism is to be differentiated from empiricist and positivist forms insofar as it distinguishes between underlying structures or mechanisms of the world and the events they cause.[23] Thus, its essential hypothesis is that there are generative structures or mechanisms at work in nature and society that cause the manifest phenomena of our natural and social world.[24] The task of sci-

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and stratified and includes structures capable of generating events; and that social phenomena are concept-dependent. Moreover, as a consequence, we not only have to explain the way they come to be, but also to understand and interpret what they mean, that science is a social practice influenced by the social relations of its production, and that science must be critical of its object—which implies also that it must be self-critical.

[21] *See* PON, *supra* note 5, at 2 ("*Naturalism* may be defined as the thesis that there is (or can be) an essential unity of method between the natural and the social sciences.").

[22] In the case of social science "independent of our thinking" makes an assertion about the existence of the structure or mechanism under investigation. It does not mean that social structures are not influenced by what and how we think of them. To the contrary the forms of social life are intrinsically meaningful and thus are shaped by our meanings and understandings. A judge or other legal practitioner may misunderstand the mechanism driving a legal rule such as consideration and this may result in a decision unresponsive to its operation. If this happens frequently enough, the mechanism itself may adjust and change, though not at all necessarily in the way the practitioner intends. Because legal relations exist independent of our knowledge of them, either legal relations may change when knowledge does not, or our knowledge may change when legal relations do not.

[23] *See, e.g.*, SRHE, *supra* note 5, at 106 (noting that "[t]he objects of scientific investigation are structures, not events; and . . . such structures exist and act independently of the conditions of their identification and in particular in open and closed systems alike."). Earlier in the text Bhaskar argues that an ontological distinction between the causal tendencies of generative mechanisms or structures and patterns of events is a condition of the intelligibility of science. *See id.* at 27.

[24] *See id.* at 286: "Causal laws are not the constant conjunctions of events that when generated under artificially produced and deliberately controlled conditions comprise their empirical grounds, but the tendencies of mechanisms ontologically irreducible to them." *Id.* The Humean approach to causality that, as a foundation for positivism, has dominated the modern philosophy of science, assumes a monovalent world composed of atomistic things and events that are independent of one another. According to Hume, we form the idea of causal necessity from observing a constant conjunction of such events. *See generally Of the Idea of Necessary Connection*, DAVID HUME, A TREATISE OF HUMAN NATURE, (Bk I, Section XIV-XV, 155-76) (1888). When *Y* follows *X* in an empirically invariant sequence, then we can say that a relation of cause and effect exists between them. Typically, however, it is forgotten that such regularities depend on the intervention of human practice while causal laws do not. *See* SRHE, *supra* note 5, at 28. Empirical regularities are usually produced in the closed system of the experimental laboratory and

ence is to discover those (often hidden) structures.[25] Gravity is a natural mechanism that causes the movement of the tides. Given the movement of the tides, the task of science is to discover the mechanism or mechanisms that produce their ebb and flow.[26]

Comparably, judicial decisions make use of the doctrine of consideration to resolve particular disputes. The critical realist proposes the existence of a social mechanism at work distinct from these decisions but tending to generate them. The investigator's task is to describe and explain such mechanism accurately.

The distinction just suggested between the flow and flux of events and the structures that cause them implies that the world is stratified and differentiated. By stratification the critical realist means that the world must be understood to include different levels of reality and these cannot

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occur only most exceptionally in nature and not at all in social life. Moreover, what we search for in the laboratory is not the conjunction of events, but the mechanisms generating them. The critical realist approach therefore approaches causation as a consequence of the power of generative mechanisms or structures that are intrinsically related by links of natural necessity to the events they cause. A mechanism is capable of generating a particular effect by virtue of the real causal relation between them. But because the world is open, one mechanism may be overridden by, or affected in its operation by another, and thus the cause occurs but the effect remains unrealized. As a consequence, while constant conjunctions are empirical, causal laws are not, *see id.*, and knowledge of them must be "understood as specifying the tendencies of mechanisms rather than as licensing the deduction of events." *Id.* at 31. If I hold a set of keys against a wall and release them they will fall, but my demonstration of the operation of gravity will fail if the portion of the wall I touch is magnetized. Because causal laws must be understood as tendencies, not invariances, explanatory rather than predictive criteria must be the basis for evaluating theory. *See id.* at 56-58. This is particularly true for the social sciences in which decisive test situations comparable to an experimental laboratory are unavailable. *See* PON, *supra* note 5, at 176 ("Social phenomena only ever occur in open systems. It follows from this that criteria for theory-development cannot be predictive and so must be exclusively explanatory."); *see also infra* note 39. For a summary of Bhaskar's critique of the Human concept of laws, *see* RTS, *supra* note 5.

[25] *See* PON, *supra* note 5, at 13 ("[o]n this, transcendental realist view of science, then, its essence lies in the *movement* at any one level from knowledge of manifest phenomena to knowledge of the structures that generate them").

[26] MCMULLIN, *supra* note 8, at 32, explains how a mechanism may be unperceivable, either in principle or in the current state of a science's development, and, in either case, itself depend upon other mechanisms unknown to us. Nonetheless, the model we construct may advance our (fallible) knowledge. For example, geologists, by the turn of the century, knew that similarities in soil and fossil specimens suggested South America and the West Coast of Africa were once connected. However, investigators could not explain how the continents could have moved through the ocean floor. In the 1960s, a model was proposed suggesting that both the continents and the seas were carried on floating plates. Needless to say, the underlying structures and mechanisms of plate tectonic motion are hidden from view and unobservable. Investigators were nonetheless able to locate rifts on the ocean floor confirming the theory and to also locate lava flows where plates had pulled apart. Moreover, the lava had magnetic properties that allowed it to be dated; this in turn made it possible to trace how distinct plates had moved over time.

be collapsed or reduced to the plane of experience only as has been the tendency of empiricist and positivist thought since Hume.[27] Instead Bhaskar distinguishes three distinct levels of being: the empirical, the actual, and the real.[28] The distinction between the empirical and the actual can be illustrated by considering the appearance of a straight straw in a glass of water. Because of the different refractive properties of water and air, we experience the straw as bent. In actuality it is straight. What causes the deflection is a real mechanism to be discovered by science (e.g., of wave propagation through different media). Thus, neither the empirical nor the actual, insofar as they do not transparently express the underlying natural mechanism at work, exhaust the real.[29] Nor can the

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[27] *See generally* RTS, *supra* note 5, at 40-41 (describing philosophy's concern whether knowledge of the world can be reduced to sense-experience).

[28] *See id.* at 13, 56-62 (describing the domains of the real, the actual, and the empirical); COLLIER, *supra* note 5, at 42-50 (same).

[29] This example is easily misunderstood. Experience, for Bhaskar, is a social product, a product "of the cognitive and conceptual structures in terms of which our apprehension of things is organized." *See* SRHE, *supra* note 5, at 284. Moreover, because experience depends on such structures it is necessarily independent ontologically of the things and events that form the stuff of our perceptions—"categorically independent," he explains, using 'categorically' in the philosophically strong sense of differentiating kinds of being. *See* RTS, *supra* note 5, at 32. Thus, Bhaskar writes:

> If changing experience of objects is to be possible, objects must have a distinct being in space and time from the experiences of which they are the objects. For Kepler to see the rim of the earth drop away, while Tycho Brahe watches the sun rise, we must suppose that there is something that they both see (in different ways). Similarly when modern sailors refer to what ancient mariners called a sea-serpent as a school of porpoises, we must suppose that there is something which they are describing in different ways. The intelligibility of scientific change (and criticism) and scientific education thus presupposes the ontological independence of the objects of experience from the objects of which they are the experiences.

Id. at 31.

Now in the example given, the objects of experience must be disentangled. What one sees is the straw. But nature communicates the straw's shape unusually in consequence of the different refractive properties of water and air. The image that hits the eye accurately conveys this difference. Even though the image does not present the shape of the straw as it is, we do perceive accurately what is carried by the light reaching the eye.

In Bhaskar's terms, both the straw in the glass and the light carried to the eye belong to the ontological domain of the actual. These are phenomena of nature that we apprehend through sense experience—the first a thing, the straw, and the second patterns of light resulting from the combined impact of the straw, the different media, water and air, and light. By contrast, we experience the straw as bent, and bent in a way disorienting to us. Thus, in explaining the specific social character of the facts we experience Bhaskar writes, "for the facts are not what are apprehended in sense-experience (things, events, etc.), but the products of the conceptual and cognitive structures in terms of which our apprehension of things is organized." SRHE, *supra* note 5, at 284.

It follows that to reduce the perceptive experience to the appearance of the straw would be to conflate the domains of the empirical and the actual, experience to events,

underlying mechanism be reduced to the pattern of events it has caused. The movement of the tides constitutes an actually occurring pattern of events. It is generated by a real mechanism of nature we call gravity and influenced as well by storms, currents, seismic activity, etc. The events we experience are produced by the conjunctural operation of such real mechanisms. In the social world of law, judicial decisions constitute actual events that reflect the operation of different social and psychological mechanisms that may be experienced differently by various participants or observers. The task of science is to discover the mechanisms that, in their conjunctural operation, generate such events.

The world is also differentiated. This means that the underlying mechanisms, which in their multiple interactions generate phenomena, are distinct mechanisms. Science seeks not only to discover these mechanisms but also to distinguish them in their particularities by expressing them, insofar as they are understood, in real definitions.[30] A real definition is a fallible attempt to capture in words the essential structure of a thing. Part of the real definition of copper, for example, is that it has an atomic weight of 63.5;[31] one cannot claim an element of a different atomic weight is copper. The key to giving a real definition here is the atomic structure of the metal; no other mineral or other material has the same structure or weight. Thus a real definition of an element is necessarily rooted in a scientific theory capable of explaining such structure.[32] A scientist may classify a group of things together because they possess a common structure; for example, a chemist will classify diamonds, graphite, and black carbon together because of the structural commonalties they possess.[33] The classification in terms of atomic structure does not reflect logical definition—a relation between statements—but instead reflects the way things are understood to be.[34]

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and to miss the specificity of experience as a meaning filled social product.

[30] *See* COLLIER, *supra* note 5, at 64-67 (explaining that an "entity whose structure has been discovered may very well come to be *defined* by that structure"); RTS, *supra* note 5, at 171-75, 209-15 (describing how the attribution of natural necessity allows for a definition of a thing in terms of its structure and the way it tends to act); *id.* at 88 ("[t]he essence of hydrogen is its electronic structure because it is by reference to it that its powers of chemical reaction are explained; the essence of money is its function as a medium of exchange because it is by reference to this that e.g. the demand for it is explained.").

[31] *See* RTS, *supra* note 5, at 211.

[32] *See id.* at 210 (explaining that "[t]o classify a thing in a particular way in science is to commit oneself to a certain line of inquiry.").

[33] *See id.*

[34] *See* SAYER, *supra* note 5, at 160:

> The main problem is a confusion between logical necessity or possibility, which concerns relations between statements, and natural or material necessity or possibility which concerns relations between things. Now it was noted earlier that conceptual changes are generally introduced in order to

Because it is not possible for a thing to act inconsistently with the imperatives of its structure and remain the kind of thing it is, things may be distinguished in their operations.[35] In law the task of identifying different real mechanisms and giving expression to them allows for a differentiation of mechanisms such as, for example, the mechanism of consideration or mechanisms that generate legal rules concerning promissory estoppel, the doctrine of modification, and so forth.[36]

> try to improve the practical adequacy of our knowledge, or to improve the ability of our concepts to 'map' the structure of the world. When we feel confident that we have discovered a necessary or internal relation in the world we may sometimes reflect it in our discourse in the form of a 'conceptual necessity,' by making the reference to the relation part of the definition of the objects involved. For example, it is true by definition that a father (in the biological sense) is a man who has or has had a child. But this is not *just* a tautology or an arbitrary definition, for the conceptual necessity is used to denote an empirically discovered natural necessity in the relationship between males and procreation. It is not merely due to the quirks of our definitions that a child cannot come into the world without having had a biological father and mother.

[35] *See* RTS, *supra* note 5, at 51 (stating "for a generative mechanism is nothing other than a way of acting of a thing"); *see also id.* at 209-13 (describing the dialectic between "taxonomic and explanatory knowledge"—between an understanding of what kinds of things there are and how they behave).

[36] Words may fail to refer to things with any essential structure capable of being located theoretically. It follows that such things are not capable of being expressed by real definition. For example, you cannot give a real definition of "chair." *See id.* at 210. There is no essential feature or structure common to all things we call chairs and without which we do not have a chair. Thus, COLLIER, *supra* note 5, at 66-67, in explaining the point, distinguishes "jade," for which there can be no real definition because the various stones we call jade lack a common inner structure, and "water," which may be defined as H_2O. Once the atomic composition of water has been discovered we do not call anything water unless it is H_2O. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 66, 67, at 31-32 (G.E.M. Anscombe trans., 3d ed. 1958) has shown that the word "game" has no feature common to all things we call games. Furthermore, in a provocative commentary on the Wittgenstein passage, LEO KATZ, BAD ACTS AND GUILTY MINDS 90-92 (1987), suggested this is true of theft—it may not be possible to locate any common structure to all things we call theft.

Corbin, Atiyah and others would argue the same is true of consideration—it is a word that refers at best to a family of phenomena without any essential feature or structure common to them all. *See* 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 109, at 487-90 (1963) ("no particular definition can (or ever could) be described as the only 'correct' one"); ATIYAH, *supra* note 13, at 180-82. At most, the argument runs, consideration is a label we attach to those promises that courts will enforce. Certainly if we insist on gathering all things to which the term has been applied, this would be true. But consideration has mainly referred to bargain promises and if precision of thinking about real mechanisms of social life can be had by restricting the meaning of concepts used to express them, this seems legitimate. In this article I argue that a mechanism does exist to explain why bargain promises are enforced, a mechanism different from those that lead to the enforcement of promises modifying an existing bargain, for example. An essential feature of the bargain promise mechanism is that it involves the volitional relinquishment of autonomy. Because this is mainly what consideration is about, the word can be appro-

In addition, the world, whether natural or social, must be characterized as an open system.[37] This means that the phenomena of Xthe world we experience are the product of an unrestricted intersection of natural or social mechanisms such that we can expect no regular sequence of events to occur. A universe of billiard balls bouncing around a table is closed and events that occur lend themselves to prediction.[38] By contrast, because of the open character of both the natural and social worlds, science must be explanatory, not predictive, although conditions of closure can be approximated for natural science in an experimental laboratory and for social science by evaluating the past.[39] Thus, knowing the mechanisms

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priately narrowed in its meaning to give expression to this mechanism. On this account the *Restatement* would be correct to distinguish promises that are enforced because of the presence of consideration and promises that are enforced without consideration. *See infra* notes 219-23 and accompanying text.

[37] *See* RTS, *supra* note 5, at 33 (distinguishing open systems, in which no regular sequence of events occurs, and closed systems where constant conjunctions occur).

[38] *See* COLLIER, *supra* note 5, at 33-37 (describing how we conduct experiments in closed systems to find out what happens in open systems when we are not making experiments).

[39] *See* RTS, *supra* note 5, at 51: "[Science] is concerned essentially with what kinds of things they [the things that make up the world] are and with what they tend to do; it is only derivatively concerned with predicting what is actually going to happen." PATEMAN, *supra* note 5, at 7-8, describes how the pastness of an event can approach experimental closure once the link positivism has established between science and prediction is broken:

> Bhaskar . . . argues that exceptionless regularities are organizations of empirical phenomena that we produce with difficulty in the experimental laboratory and that what we are doing in the experimental situation is creating a closed system (or an approximation to one) in which the number and kind of real mechanisms at work which produce the phenomena is strictly controlled. Indeed, the interest we have in the experiment is not in producing the regularity for its own sake but as a means of isolating the mechanisms responsible for the production of phenomena. It is about these mechanisms that we make scientific claims, claiming that mechanism X is capable of producing effects a, b, c, . . . or liable to produce p, q, r, . . . and will produce them, all other things being equal. The experiment is our attempt to make all other things equal.
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> Outside the laboratory, of course, things are not equal; the real mechanisms at work in the world operate in an open system where it would indeed be surprising if exceptionless regularities were produced. Outside the laboratory it remains true that mechanism X is capable of producing effects a, b, c, . . . and will if all other things are equal—but they never are and so the effects are frequently not produced. Now something like linguistic change is completely outside the laboratory and we simply cannot expect it to be regular or predictable. But that is not to say that there are not mechanisms at work which would produce certain effects if all other things were equal and will do so when they are. . . .
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> This all amounts to saying that realism breaks the link positivism insists upon between science and prediction. The two central tasks of science are now seen to be these: (1) isolating and describing the real causal mechanisms at work in producing the world of events; [and] (2) reconstructively explaining past events in terms of the conjunctural operation of

that cause the enforcement of promises does not enable an investigator to predict what a particular judge in a specific case may decide. Breakfast may count. On the other hand, it may enable us to explain the persistence of legal doctrine over four centuries.

Finally, a differentiation necessary to the study of social life is the distinction between societies and people. According to Bhaskar, there is an ontological difference here.[40] Both people and societies are real but the nature of their being is not the same.[41] What characterizes people is activity and human activity is characterized in turn by intentionality.[42] Though we speak all the time as if intentionality were a feature of social structures,[43] this is at best a metaphor. The social forms presupposed by

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> particular mechanisms. . . . In relation to (2), we can say that the pastness of an event is equivalent to an experimental closure. A determinate number of causal mechanisms must have been responsible for the event, and we can try to work out what they were.

[40] *See* PON, *supra* note 5, at 13-17 (asking "what properties do societies and people possess that might make them possible objects of knowledge for us?"); *id.* at 31-37 (describing the "society/person connection" and the "transformational model of social activity"); *see also* RR, *supra* note 5, at 92-95 (distinguishing social structure and human agency); SRHE, *supra* note 5, at 122-28 (describing the "transformational model of social activity").

[41] *See* RR, *supra* note 5, at 71 ("The properties possessed by social forms may be very different from those possessed by individuals upon whose activity they depend.").

[42] *See* PON, *supra* note 5, at 35:

> Human action is characterized by the striking phenomenon of intentionality. This seems to depend upon the feature that persons are material things with a degree of neurophysiological complexity which enables them not just, like the higher animals, to initiate changes in a purposeful way, to monitor and control their performances, but to monitor the monitoring of these performances and to be capable of a commentary upon them.

See id. at 80-114 (investigating the properties people possess that make them possible objects of knowledge).

[43] Examples are widespread in contracts literature. For example, in explaining that the obligation of promise presupposes a social context, Atiyah writes:

> The social group may, indeed, pay great attention to the desires and interests of its members in determining what obligations it should impose upon them, and what entitlements it should recognize; but it is the social group which makes the decisions and creates the obligations and entitlements.

ATIYAH, *supra* note 13, at 130. Tobin Nellhaus reminds me that a drama club may choose people to read a selection from a play, listen together to the reading, discuss how to modify the scene and decide to implement changes. In this sense, a social group may make and impose a decision. But Atiyah's "social group" here is synonymous with society, for he extends it "in an appropriate context," to "the human race as a whole." *Id.* at 127. Yet when the concept is used broadly in this fashion for people acting through its legal and moral institutions, then concepts of intentionality, such as "decision," are metaphorical.

In CONTRACT AS PROMISE, Fried targets Atiyah, among others, for attempting to subordinate the individual to the imperatives of some such personified group:

> In imposing [legal obligation] the community must be pursuing its goals and imposing its standards, rather than neutrally endorsing those of the

all action, and that exist only in and through the human activities of individuals, persist and are transformed. But such forms of activity are not characterized by consciousness and do not decide or intend. We cannot think of society as a metaindividual, an entity with a collective memory or group psyche the way some have understood Durkheim's collective mind.[44] But neither can we reduce society to the actions of individuals—the error of methodological individualism. "An army is just the plural of 'soldier,'"[45] is an example of this mistake. Nor does equating the concept of society with group behavior such as riots take the analysis further. Instead, society is better understood as an ensemble of relational structures: teacher-student, employer-employee, parent-child, male-female, white-black, promisor-promisee, and so forth. These structures—social institutions such as education, employment, parenting, gender, race, and promising—preexist individual actions and are presupposed by them. I become a husband, but marriage exists before I marry. I do not create the social institution of marriage, but neither can it exist except through persons like me. In other words, society exists in virtue of its effects on human activities.[46] And by my participation in the ac-

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> contracting parties . . . This assimilation of contract to tort is . . . the subordination of a quintessentially individualist ground for obligation and form of social control, one that refers to the will of the parties, to a set of standards that are ineluctably collective in origin and thus readily turned to collective ends.

FRIED, *supra* note 3, at 2-5. But neither party to the debate works with an adequate concept of society. While Atiyah's personification of the collective ignores real structures and forms of constraint that operate to shape social life independent of intention or will, Fried's methodological individualism reduces facts about society to facts about individuals and also forgets the social forms within which the intentional acts of individuals occur. The concept of society as an ensemble of structures and relationships presupposed by every human act, as described in the text above, is missing in both accounts. Society is not a collective making a decision nor an abstraction used to refer to many concrete individuals, but whose reality, in contrast to the reality of individuals, is conceptual only. Instead, society is real, and its structures must be understood if they are to be consciously transformed.

[44] *See* Mary Douglas, *Foreword: No Free Gifts, in* MAUSS, *supra,* note 14, at xi: ("[I]t would be easy to misunderstand Durkheim's language and to fall into the trap of thinking that he really believed that society is a kind of separate intelligence that determines the thoughts and actions of its members as the mind does the body it is lodged in."); *see also* PON, *supra* note 5, at 30-37 (comparing Durkheim's collectivist conception of society with the relational conception of critical realism); RR, *supra* note 5, at 73-77 (same).

[45] *See* PON, *supra* note 5, at 27 (quoting I. Jarvie, 1959 UNIVERSITIES AND LEFT REVIEW 57 (1959)).

[46] *See* RR, *supra* note 5, at 82:

> Society, as an object of inquiry, is necessarily 'theoretical' in the sense that, like a magnetic field, it is necessarily unperceivable; so that it cannot be empirically identified independently of its effects. It can only be known, not shown to exist. However in this respect it is no different from

tivities of marriage within the form or framework of the institutional structure presupposed, I necessarily either reproduce or transform that structure. The social relation of marriage is both a presupposed condition of my act of marrying and a reproduced outcome of it. Thus, whereas purpose or intention or self-consciousness can characterize human actions, these do not characterize transformations of the social structure:

> [P]eople do not marry to reproduce the nuclear family or work to sustain the capitalist economy. Yet it is nevertheless the unintended consequence (and inexorable result) of, as it is also a necessary condition for, their activity. Moreover, when social forms change, the explanation will not normally lie in the desires of agents to change them that way, though as a very important theoretical and political limit it *may* do so.
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> I want to distinguish sharply, then, between the genesis of human actions, lying in the reasons, intentions and plans of people, on the one hand, and the structures governing the reproduction and transformation of social activities, on the other. . . .[47]

"Thus," Bhaskar continues, "we do not suppose that the reason why garbage is collected is necessarily the garbage collector's reason for collecting it. . . ." [48]

Nor, *pace* Fried, can we suppose that the promisor's reason for promising is the reason promises are enforced.[49] I want to distinguish the agent's intentional act of promising—without which the social relation of promising could not exist—from the social function of promising. The latter reflects the reproduction of an underlying social structure. And it is the social structure on which promising depends that explains the legal obligation of promise.

Nonetheless, it is the intentional act of promising that makes such legal obligation possible and through which it exists. Thus, there is not only an ontological hiatus between society and people but also a mode of connection.[50] Because social structures exist through the intentional ac-

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> many objects of scientific inquiry. What does differentiate it is that society not only cannot be empirically identified independently of its effects, but it does not *exist* independently of them either.

[47] PON, *supra* note 5, at 35.

[48] RR, *supra* note 5, at 80.

[49] *See* FRIED, *supra* note 3, at 13. The failure to appreciate this distinction is the overriding methodological error of Fried's analysis. Fried assumes the social institution of promising exists to realize the projects of the individual promisor. But I explain below that the obligation of promise functions to facilitate the productive social connection of individuals under circumstances of interdependent autonomy.

[50] *See* PON, *supra* note 5, at 37 (establishing both an ontological hiatus and mode of connection between society and people).

tivities of individuals and are at the same time constantly being reproduced or transformed, individuals in their activities must fill positions or functions in the social forms presupposed.[51] Hence, the relational structure of promising presupposes a promisor and promisee. An individual agent participating in the exchange of promises becomes either one or the other or both, and in so doing either reproduces or transforms the social form of promising. That is, although the obligation of a promise can only be explained as an expression of the social function of promising, nonetheless, it is the specific character of the individual act of promising that makes social obligation possible.

As a philosophical method, critical realism tells us the necessary conditions for the production of knowledge—it can tell us that it is necessary to understand society as a relational ensemble of structures, for example.[52] It can tell us what can be established by a priori argument. What it cannot do is tell us what the substantive results of any study of society will be; it cannot tell us what the substantive content of those social structures might be—this is the task of particular social sciences.[53]

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[51] *See id.* at 40-41:

> [I]t follows . . . that social structures (a) be continually reproduced (or transformed) and (b) exist only in virtue of, and are exercised only in, human agency (in short, that they require active 'functionaries'). Combining these desiderata, it is evident that we need a system of mediating concepts, encompassing both aspects of the duality of praxis, designating the 'slots,' as it were, in the social structure into which active subjects must slip in order to reproduce it; that is, a system of concepts designating the 'point of contact' between human agency and social structures. Such a point, linking action to structure, must *both* endure and be immediately occupied by individuals. It is clear that the mediating system we need is that of the *positions* (places, functions, rules, tasks, duties, rights, etc.) occupied (filled, assumed, enacted, etc.) by individuals, and of the *practices* (activities, etc.) in which, in virtue of their occupancy of these positions (and vice-versa), they engage. I shall call this mediating system the position-practice system. Now such positions and practices, if they are to be individuated at all, can only be done so *relationally*.

[52] *See id.* at 5-6, 26, 37-44 (describing society as an ensemble of generative structures and a complex totality).

[53] *See* RR, *supra* note 5, at 14:

> Philosophy, then, does not consider a world apart from that of the various sciences. Rather it considers just that world, but from the perspective of what can be established about it by *a priori* argument, where it takes as its premises scientific activities as conceptualized in experience (or in a theoretical redescription of it). As such, philosophy is *dependent* upon the form of scientific practices, but *irreducible* to the content of scientific beliefs. Thus philosophy can tell us that, if experimental activity is to be intelligible, the world must be structured and differentiated. But it cannot tell us what structures the world contains or the ways in which they are different, which are entirely matters for substantive scientific investigation.

See also PON, *supra* note 5, at 167, stating that the possibility of naturalism "could only

The substantive results of legal inquiry as a social science depend on the study of legal relations and institutions. But the study of law itself depends on results achieved in the study of social life. In my argument I rely on two such results. These are assumptions about the nature of a market economy that are rooted in analysis begun by the English classical economists and brought to fruition by Marx:

a. Autonomy. I do rely on the fact that the market economy in which we live is characterized by the private autonomy of its agents. That is, each productive unit, whether individual, family, factory, farm, store, service establishment, or other, reproduces its own existence separately and independently. For contrast, notice that such relations do not obtain within a family, and family members do not function autonomously, or reproduce their existence autonomously the one from the other.

b. The Social Division of Labor. Although each produces autonomously, each productive unit produces a specialized product (even if only the ability to work each day) and does not produce self-sufficiently to meet the totality of its needs. Needs by nature are general, but production is specialized. As a consequence each agent looks to the market to meet her needs and uses the product of her own production as a means to obtain in exchange goods and services which will fill those needs.[54]

I will refer to the necessary structural interconnection between formal autonomy and the social division of labor as the relation of "interdependent autonomy."[55] Needless to say, this social relation is not the exclusive such relation to characterize contemporary social life. Most notably, structures of capital, patriarchy, and race play decisive roles. It is important, however, to abstract to this core relation insofar as it shapes the production and distribution of goods and services and provides a key to understanding the ways in which other social relations may be articulated together with structures of exchange.

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be actualized in the substantive practice of the various human sciences."

[54] I find these simple assumptions confirmed empirically and literally everywhere around me. At the intersection and down the street are a bookstore, a wholesale electrical supply, a couple of restaurants, a cabinet shop, and over a couple of blocks a variety of light manufacturing firms, a small stone and gravel plant, a newspaper, and so forth. Each is autonomous; each is an expression of the social division of labor. I have no acquaintances who do not depend on the market for the satisfaction of their needs.

[55] What I characterize here as the social relation of interdependent autonomy provides Marx with the foundation for his analysis of the value relation. *See* 1 KARL MARX, CAPITAL Ch. 1, § 1, at 41, § 2, at 42, § 4, at 72-73, and Ch. 2, 83 (Int'l Pub. ed., 1967) (establishing that a commodity must be the product of labor carried on independently and exchanged); KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 44-45 (Dobb ed., 1970) (concluding that particular labors of private individuals become social labor through the process of being alienated in exchange).

IV. CONSIDERATION AS THE COMMITMENT TO RELINQUISH AUTONOMY

A. *A Secret Paradox of the Common Law*

1. The Relinquishment of Autonomy

My argument has been that the legal doctrine of consideration gives expression to a social mechanism facilitating the relinquishment of autonomy and that in doing so, this mechanism functions as a means of reproducing social relations of interdependent autonomy. I need to identify the operation of that mechanism and then show how it is given expression in the doctrine of consideration.

First, I should make my meaning clear. Property, Justice Holmes wrote, "depends on the exclusion by law from interference."[56] Private autonomy clothes each individual with an immunity from unconsented interference with his or her person or possessions and it is this immunity that, to a greater or lesser extent, is foregone when one enters a contract.[57] Patterson expressed the idea in speaking of a promisor's "freedom from contract,"[58] and in discussing constructive conditions, he captures it exactly in referring to "the power which any man has before entering a contract to refuse to relinquish his property or to perform his services unless paid or promised such return as he chooses to exact."[59] If

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[56] *See* International News Serv. v. Associated Press, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting).

[57] *Cf.* Ian R. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus,"* 75 NW. U. L. REV. 1018, 1036 (1981), who refers to "unilateral power" as "any capacity a person has to subject another to some particular effect without the other's consent." Macneil considers members of society to have such power as a consequence of rights of property and liberty which give them the ability to impose sanctions on those interfering with such rights: "This is, essentially, the 'power to be let alone' with one's property and oneself." *Id.*

[58] *See* Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 943 (1958). Patterson restricted his application of the idea to the "protection of alleged promisors from flimsy or unfounded claims of contract" and did not explore its implications for the recipient of the promise. *See id.* at 963.

[59] Edwin W. Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903, 926 (1942) (citing Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935)). In the 1923 article, Hale writes:

> What is the government doing when it 'protects a property right?' Passively, it is abstaining from interference with the owner when he deals with the thing owned; actively, it is forcing the non-owner to desist from handling it, unless the owner consents. . . . The owner can remove the legal duty under which the non-owner labors with respect to the owner's property. He can remove it, or keep it in force, at his discretion.

Hale, *supra*, at 471-72.

consideration is to be established, the promisee must abandon this power at the threshold of exchange, and it is the volitional commitment to surrender it that is a precondition to holding the promise of a promisor binding.[60] This assures the autonomy of the promisee in exchange—his[61] property or performance cannot be taken without consent—and, thus, it is an act necessary to reproduce the autonomy of the promisee. By abandoning that power, the promisee enters the domain of social interconnection established by contract. Such formal independence as is protected by law is to that extent given up.[62]

The act of giving up autonomy by promise or performance is to be understood as being situated in the larger framework of choice.[63] Autonomy means the capacity to choose among alternatives in the face of circumstance. Governments preserve this power to themselves as an expression of sovereignty and it is constitutional doctrine that a legislature's power to legislate for the public good is inalienable.[64] It must reserve the

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[60] *See* Sir Owen Dixon, *Concerning Judicial Method,* 29 AUSTRALIAN L.J. 468, 474 (1956). In remarks on the occasion of receiving the Howland Memorial prize at Yale Law School in 1955, the then-Chief Justice of the High Court of Australia observed:

> It is but a step further to describe the basis of simple contract as the voluntary restriction upon the existing area of action or inaction legally open to the contracting parties and to say that simple contract is formed by the exchange of such a restriction *de praesenti* or the promise *de futuro* of such a restriction on one side for a promise of a corresponding restriction on the other.

Id.

[61] For convenience I will use forms of the feminine pronoun to refer to the promisor and forms of the masculine pronoun to refer to the promisee.

[62] *See* Ashley, *supra* note 3, at 434. Ashley thought consideration should be abolished by legislative or judicial action, but in this passage he captured the way in which the parties, by committing to the relinquishment of autonomy, "put themselves where the law can act upon them:"

> The instant one utters words of such a character as to constitute a promise if the element of consideration is found, the person so speaking has done his part towards giving the act asked, and it simply remains for the law to annex its obligatory character to it. At that point both parties put themselves where the law can act upon them.

Id.

Ashley is correct to emphasize the fact that once a promise is given "it simply remains for the law to annex its obligatory character," but he ignores the circularity of his argument: by failing to explain how consideration is to be found he makes consideration the source of obligation and obligation the source of consideration. *See* Ballantine, *supra* note 3, at 430. Ballantine, who called this "a sort of parthenogenesis," seems a source of endless metaphors for the circularity troubling consideration analysis. *See id.* at 431; *infra* note 80.

[63] *See* ALAN R. WHITE, GROUNDS OF LIABILITY 54 (1985) ("To do something voluntarily is to do it with the awareness that there is in the circumstances a genuine alternative open to one; that is, that one is a free agent and has a choice.").

[64] *See* West River Bridge Co. v. Dix, 47 U.S. (1 How.) 507, 532 (1848) (holding that

capacity to adjust its decisions in the face of changed circumstance. The philosopher Bergson developed a theory of comedy based on the human need to respond to change.[65] We find ourselves funny, he observed, when a person acts machinelike, unable to adapt to a new situation. The man in a top hat who strides pompously along the sidewalk oblivious to a banana peel underfoot makes us laugh when he falls.[66]

Plainly, choosing to act is also an exercise of autonomy, and in acting we construct the kind of person we are.[67] In the following analysis I want to emphasize both these facets of choice: in action we exercise autonomy by choosing what we do, but equally we relinquish autonomy by surrendering the capacity to do otherwise than we do.

2. A Secret Paradox of the Common Law

The promisee's commitment to relinquish autonomy arises to solve a problem of promising. No society uses law to enforce all promises;[68] as a consequence, the question posed is which promises the law will enforce. In Anglo-American law, consideration is the way to identify an enforceable bargain promise.[69]

A characteristic definition of this doctrine is as follows: consideration is a performance or return promise sought by the promisor and given by the promisee in exchange for the promisor's promise.[70] This is a

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a legislature cannot bind itself not to exercise power of eminent domain); Stone v. Mississippi, 101 U.S. 814, 817 (1880) (holding that a state cannot relinquish the police power); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.8, at 398-99 (4th ed. 1991); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-10, at 618 (2d ed. 1988).

[65] *See* Henri Bergson, *"Laughter,"* in WYLIE SYPHER, COMEDY, 61, 79 (1956) ("The attitudes, gestures and movements of the human body are laughable in exact proportion as that body reminds us of a mere machine.").

[66] *See id.* at 66 ("The muscles continued to perform the same movement when the circumstances of the case called for something else.").

[67] "Now not to know that it is from the exercise of activities on particular objects that states of character are produced is the mark of a thoroughly senseless person." ARISTOTLE, *Nicomachean Ethics*, Bk 3, Ch. 5, *in* 2 ARISTOTLE, COMPLETE WORKS 1729, 1759 (Jonathon Barnes ed. & J.O. Urmson trans., 1984).

[68] *See* Farnsworth, *supra* note 10, at 591.

[69] Although there are efforts to present consideration as the only test of an enforceable promise, *see* Wessman, *supra* note 3, at 45-46 (noting widespread agreement for the proposition that consideration is a sufficient reason to enforce a promise, but challenging the additional proposition that it is a necessary condition), neither at the origin of the doctrine nor in its long history nor at present has consideration ever functioned in this way. At common law, contracts could be enforced without consideration under the forms of action of covenant, debt, detinue, account and deceit and, additionally, commercial and local courts provided remedies for informal contracts. *See* K.O. Shatwell, *The Doctrine of Consideration in the Modern Law*, 1 SYDNEY L. REV. 289, 291-309 (1954).

[70] When someone pays money in exchange for a corporation's promise to issue stock to him, then the money is said to be consideration for the corporation's promise. If a

plumber fixes a homeowner's sink in exchange for the homeowner's promise to pay, then fixing the sink is said to be consideration for the homeowner's promise. Where mutual promises are exchanged, each is reciprocally consideration for the other—if a person promises to deliver lumber in exchange for a promise to pay, the promise to deliver lumber is consideration for the promise to pay and the promise to pay is consideration for the promise to deliver. According to the RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981):

> (1) To constitute consideration, a performance or a return promise must be bargained for.
>
> (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

In sentence (1) the performance or return promise (e.g., the plumber's plumbing) is consideration. In sentence (2) consideration is bargained for by being given in exchange for the promise that invites it. Thus, we say that a promise becomes binding when consideration is given in exchange for it. In this fashion the requirement of consideration is used to distinguish enforceable from unenforceable promises.

J. H. Baker, *On the Origins of the "Doctrine" of Consideration,* in MORRIS S. ARNOLD, et al. eds., ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE 336, 337 (1981) notes that by the 1580s "[c]onsideration had achieved the status of a doctrine, and could be defined as a profit to the defendant or a labor or charge to the plaintiff." (citing Webbs Case, 74 Eng. Rep. 763 (1577), and Richards v. Bartlet, 74 Eng. Rep. 17 (1584)). After attempts by Lord Mansfield to reduce consideration to a matter of evidence and to establish moral obligation as a basis sufficient to enforce a promise, *see* Shatwell, *supra* note 69, at 303, in the nineteenth century the concept of consideration as the thing given or done by or detriment to the promisee became consolidated. *See, e.g.,* C.C. LANGDELL, SUMMARY OF CONTRACTS § 45, at 58 (1880) (asserting that consideration is a thing given or done by the promisee); *id.* § 64, at 82 (arguing that benefit to the promisor, derived from the common law action of debt is irrelevant to deciding whether consideration has been given). Williston presented definitions in terms of benefit and detriment and treated consideration as the "price of the promise." *See* 1 SAMUEL WILLISTON, CONTRACTS § 102, at 323, § 103F, at 347 (1936).

The RESTATEMENT (FIRST) OF CONTRACTS § 75, cmt. b (1932), also used this language: "[t]he Section defines consideration in effect as the price bargained for and paid for a promise." *See also id.* § 81, cmt. a (explaining that what the promisor assents to as the price of the promise is sufficient consideration regardless of the comparative values of the promises exchanged). Thus, consideration was commonly called a "bargained for equivalent." *See, e.g.,* K.N. Llewellyn, *On Our Case Law of Contract: Offer and Acceptance, II,* 48 YALE L.J. 779, 786 (1939). Doubting that there was any one coherent doctrine of consideration or a definition that could be set up as the correct one, *see* 1 CORBIN, *supra* note 37, at § 109, 487-490 (1963), Corbin treated consideration as whatever counted as a "good reason for enforcing the promise sued on." *See* Arthur L. Corbin, *Recent Developments in the Law of Contracts,* 50 HARV. L. REV. 449, 453 (1937); *see also* P.S. ATIYAH, CONSIDERATION: A RESTATEMENT, IN ESSAYS ON CONTRACT 179, 181-82 (1986) (acknowledging his debt to Corbin: "[w]hen the courts found a sufficient reason for enforcing a promise they enforced it; and when they found that for one reason or another it was undesirable to enforce a promise, they did not enforce it"); Melvin Aron Eisenberg, *Principles of Consideration,* 67 CORNELL L. REV. 640, 642 (1982) ("[i]f consideration means the set of principles defining the conditions that make promises enforceable, the elements of consideration will be continually adjusted as it becomes socially desirable to add new or drop old conditions.") Lately, drawing upon Lon L. Fuller, *Consideration and Form,* 41 COLUM. L. REV. 799 (1941), it has be-

contemporary form used to express the commitment to relinquish autonomy as a social mechanism. In exchange each participant relinquishes autonomy and a legal rule emerges to accommodate this threshold requirement.

One way the requirement can be met is by performance. When one person gives a performance to another, then actual performance necessarily involves a surrender of autonomy. By performance I give up irrevocably the power to do other than I have done. If I do an act, I have relinquished forever the power not to do it. As Bhaskar observes, it is analytic to the concept of action that the agent could have done otherwise.[71] If the muscles of your face twitch from time to time and you are powerless to do anything about it, then this is something that happens to you, not something you do.[72] It is not an action.[73] Wittgenstein asked what is left of "I raise my arm," if I subtract the fact that my arm goes up.[74] The feature left, intentionality, makes possible the distinction between those things which happen to me and those things that I do.[75] I intend to raise my arm and my arm goes up. But when I do one thing, by acting I forego the possibility of all other alternatives otherwise avail-

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come commonplace to emphasize the function of consideration as a requirement of form. *See, e.g.*, Barnett & Becker, *supra* note 4, at 450-51 ("consideration is a formality much like the formality of a sealed instrument . . . identifying promises probably made with an intent to be legally bound").

[71] *See* PON, *supra* note 5, at 146; *cf.* Michael Corrado, *The Act Requirement in the Criminal Law*, 142 U. PA. L. REV. 1529, 1560 (1994) ("The ability to choose otherwise is a basic condition of responsibility for action . . . . ").

[72] *See* GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 148 (2d ed. 1983):

> A bodily movement is said to be willed, generally speaking, when the person could have refrained from it if he had so willed: that is he could have acted otherwise or kept still . . . . Whatever the difficulties in explaining what we mean by volition, everyone realizes the important differences between doing something and having something happen to one; and this distinction is a basic postulate of a moral view of human behavior.

[73] *See* WHITE, *supra* note 63, at 25 ("One important distinction drawn in everyday thinking and, hence, in everyday language, is that between what somebody or something *does* and what *happens*."); *see also* WILLISTON, *supra* note 70, § 102A, at 329 (stating "it is probable also that no performance can serve as consideration if the promisee had no power to refrain from performing the act. . . . If the promisee refrains as requested, but could not, had he wished, have done otherwise, he has certainly incurred no detriment . . . ."); *cf.* RESTATEMENT (SECOND) OF TORTS § 2 cmt. a (1965):

> Necessity of volition. There cannot be an act without volition. Therefore a contraction of a person's muscles which is purely a reaction to some outside force, such as a knee jerk or the blinking of the eyelids in defense against an approaching missile, or the convulsive movement of an epileptic, are not acts of that person.

[74] *See* WITTGENSTEIN, *supra* note 37, § 621, at 161: "Let us not forget this; when 'I raise my arm,' my arm goes up. And the problem arises: what is left over if I subtract the fact that my arm goes up from the fact that I raise my arm?"

[75] *See* PON, *supra* note 5, at 82.

able to me. My arm does not go down. Abandoning these alternatives in action is also a surrender of choices available and, to that extent, a surrender of autonomy. Moreover, this remains true if the performance is simple non-action, a forbearance, for the actor could have acted instead of not acting.[76]

By giving a return performance, a promisee relinquishes autonomy in fact, and this may seem unproblematic. But the same cannot be said of promise. In what sense does a promise involve a relinquishment of autonomy? If all a person does is promise, how has he or she done or not done anything?

As early as 1702, a common response was given: "where the doing of a thing will be good consideration, a promise to do that thing will be so too."[77] A person will be bound to do that which she has promised. If the performance or forbearance promised would be consideration, then the promise to do or forbear will be also.[78]

The reasoning, however, is circular, and it is this circularity which Pollock called "a secret paradox of the common law."[79] In order to de-

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[76] Throughout this essay I use "act" or "performance" to include a forbearance to act or perform.

[77] *See* Thorp v. Thorp, 88 Eng. Rep. 1448, 1450 (K.B. 1702).

[78] *Cf.* RESTATEMENT, *supra* note 70, at § 75 ("A promise which is bargained for is consideration if, but only if, the promised performance would be consideration.").

[79] *See* Sir Frederick Pollock, 30 L.Q. REV. 128, 129 (1914) (unsigned review). A young Williston noticed the problem in Langdell's explanation of consideration for mutual promises. *See* Samuel Williston, *Successive Promises of the Same Performance*, 8 HARV. L. REV. 27, 34-35 (1894) ("[u]nless a promise imposes an obligation, no promise whatever can be considered a detriment. It is, therefore, assuming the point in issue to say a promise is a detriment because it is binding.") After some period of silence, Langdell stiffly replied that the criticism required response because it amounted to asserting that he was either "incompetent or dishonest," but in the last analysis Langdell missed the point and thought it obvious that one promise given for another was binding unless a defendant could establish some defect in the promise such as incapacity or illegality. *See* C.C. Langdell, *Mutual Promises as a Consideration for Each Other*, 14 HARV. L. REV. 496, 498, 504 (1901). But the problem, which Ballantine, *supra* note 77 at 427, characterized as one of "show[ing] how it is that reciprocal promises can support each other, like two men mutually holding each other above the ground," would not so easily disappear. See generally, Richard Bronaugh, *A Secret Paradox of the Common Law,* 2 L. & PHIL 193 (1983), for a provocative review of this history from the perspective of the problem which occasioned it, the "oblique promise," a promise given to one person which a promisor is already under an obligation to perform for a third person. Williston thought to dissolve the paradox by finding detriment in the performance promised rather than the promise itself. *Compare Successive Promises with* Williston, *supra* note 71, § 103F, at 347. But Corbin showed detriment was not necessary to consideration, *see* 1 CORBIN, *supra* note 36, §§ 122-23, at 523-31; § 142, at 611-14 (1963), and came to the defense of the question begging:

> Therefore, when the statement is made that no informal promise is enforceable if it is without consideration, it must be understood as a statement that no informal promise is enforceable unless it is accompanied by one of

termine which promises are enforceable, we have assumed the promisee is bound to do what he has promised. Otherwise, how can what is promised be something given; if the promise is not performed, nothing is given. The question presented has been answered by assuming the answer. In fact, behind the question of which promises are binding is the question of what makes promises binding at all. If, for example, we consider a promise binding because it invites reliance, the question is posed: what justifies reliance unless promises are binding?[80]

B. Promising and the Relinquishment of Autonomy

1. How Promises Bind

Recall that it is analytic to the concept of action that an agent could have done otherwise. By promising, a promisor asserts that she will act as she has promised and not otherwise; that is, she manifests an intention to constrain choice in the future.[81] But autonomy consists precisely in an actor's capacity to choose what to do or not to do. Thus, promising may be understood as a manifestation of an intention to relinquish choice among alternatives and, as a consequence, autonomy for the future.

Notice that this does not depend either on obligation or on whether the promise is performed. It is important to distinguish between the meaning of a promise and the obligation of a promise. A promise is in itself an action in the sense that an agent need not have promised. But action typically consists in causally intervening in the material world and

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> those factors that have been held, more or less generally, to be sufficient to make a promise enforceable. As thus understood, is the statement much better than to say that an informal promise is legally enforceable when the facts are such as to make it legally enforceable? Is it shocking to put a definition or rule of law in such a naked form as to show that it completely begs the question? It should not be so; for what often seems to be our favorite method of legal argument is to beg the question in complicated and repetitious terms. It should console us for our frailty that a conclusion is not necessarily wrong because it was arrived at by merely assuming or asserting it—by begging the question.

Id. 1 § 110, at 492.

The *Second Restatement*'s emphasis on act, intent, and inducement in § 71 offers the keys necessary to resolve the dilemma. But without developing an explanation, it turns aside from the problem: "the promise is enforced by virtue of the fact of bargain, without more." *See* RESTATEMENT (SECOND) OF CONTRACTS § 75 cmt. a.

[80] *See, e.g.*, ATIYAH, *supra* note 13, at 37; Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 274-76 (1986); Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 500 (1989).

[81] *See* RESTATEMENT, *supra* note 71, § 2 ("A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.").

a promise does not do this except trivially in the sense of moving air by speaking words.[82] Whether or not a promise transforms the world depends not on the act of promising, but on either performance or the enforcement of an obligation to perform. Nonetheless, the act of promising is intrinsically meaningful and a promise does intervene in the network of meaning woven by communication among persons. As such, it measures what a person does. Whatever a person does at the time for the promised performance is affected in its significance by the fact of the promise. Without obligation a promise need not be performed, but like any other act, it cannot be erased.

A promise, therefore, manifests a commitment to relinquish autonomy and offers a mode of connection between the individual act of promising and the social structure of promising.[83] We may conceive of the social forms presupposed by acts of human agency as positions to which the practices of social actors correspond. A baseball game requires a pitcher, a batter, a right fielder, and so forth. These are roles, the positioned practices into which individuals who play the game must fit their skills and capacities. Such social forms preexist and are presupposed by all human activities—being a plaintiff requires a court system; attending lectures, teacher-student relations, punching a time clock, employer-employee relations, and so on.

Exchange also is a social form that requires individuals to take specific roles in order for the process to unfold. Recall that the institution of exchange responds to the contradiction presented by the social relations of interdependent autonomy—persons who are formally autonomous, but not self-sufficient, are dependent on one another for the totality of their needs. As a consequence, they are driven necessarily to exchange. Through exchange they are able to meet their needs and, because of the consensual character of the process, are able to preserve their autonomy in so doing. Taken in abstraction from legal obligation, this social process requires one person to find another who will give something for whatever product or service is offered by the first. Each acts intentionally and at the same time recognizes the intention of the other. Neither can take the product of the other without consent. Each has the capacity to enter or refuse to enter the relation of social interconnection established by exchange.

Just as a person must find another who will give something in return for what he or she has offered, so too a promisor who enters exchange must find another who will give either a performance or a promise in re-

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[82] *See* Ballantine, *supra* note 3, at 427; 1 CORBIN, *supra* note 37, § 142, at 612.

[83] *See supra* note 52 and accompanying text.

turn for the promisor's promise. If performance is given, then the promisee manifests a commitment to exchange by the fact of his action at the instance of the promisor, he gives up the power to do other than he does. Equally, if a promise is given, the promisee manifests an intention to provide the performance promised and to forego alternatives otherwise available. In the event, both promisor and promisee commit to surrendering the autonomy presupposed by each in favor of their commitment to exchange.

Thus, by their individual actions both the promisor and the promisee undertake a position in the structured social practice of promising. Because the meaning of a promise is to constrain choice for the future, it can be the subject of obligation. If the promisor does not do that which she promised, she can be compelled to do so or suffer penalty for her failure. The manifestation of an intention to constrain choice is a mode of connection to the social practice of promising insofar as the constraints intended by the promisor and the promisee can be coercively compelled.[84]

2. Why Promises Bind

Although each participant relinquishes autonomy in the actual process of exchange, a promise will lead to the surrender of autonomy in fact only if performed or enforced. But enforceable obligation depends not on the individual act of promising but on the social forms presupposed by the agent's promise. Social forms of this sort are relations or structures within which we act and, while presupposed by all human activities, are also reproduced by them. The relations of interdependent autonomy are social forms presupposed by every act of private exchange. So too interdependent autonomy and private exchange are presupposed by the institution of promising. Each individual agent of the economy produces independently and, as a result of the social division of labor, produces products not for survival but for exchange. In consequence, everyone must have recourse to exchange in order to meet his or her needs and each looks upon her or his product not as an end in itself but as a means to obtain other goods and services through exchange. Promising performance is therefore a way to obtain what one needs through exchange.

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[84] Bhasker observed that because we not only monitor our actions but monitor also our monitoring, we can plan what we do. Moreover, because by action we bring about changes in the world that would not have been realized except for what we do, we cannot only plan, but also "make an anticipatory commentary come true." *See* RTS, *supra* note 5, at 239. It follows that if an anticipatory commentary, accompanied by a commitment, fails to materialize, consequences can attach. Promise provides a foundation for social obligation.

A promisor uses her promise to induce a return promise or performance. Several points about this process must be developed.

First, the transaction by which a promisor induces a relinquishment of autonomy is a specific act with another for the satisfaction of particular needs. The promisor engages in a series of such discrete transactions for the satisfaction of the totality of her needs. In this fashion the isolation established by formal autonomy and the social division of labor can be overcome, but it is overcome enforceably only by contract. In a form of society dependent on market exchange, the circulation of goods and services, the total production of society, and the allocation and distribution of its aggregate labor and wealth among the members of society is accomplished by just such particular acts of private exchange between specific individuals or individual entities.[85] If these transactions do not occur, goods and services are not distributed and production cannot continue. Social reproduction fails. Thus, private exchange is a mechanism for the distribution of goods and services on which new production and social reproduction depend.[86]

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[85] Such as corporations or other forms of business organization.

[86] *See* Fuller, *supra* note 71, at 809:

> [W]e have come to view the distribution of goods through private contract as a part of the order of nature, and we forget that it is only one of several possible ways of accomplishing the same general objective. Coal does not have to be bought and sold; it can be distributed by the decrees of a dictator, or of an elected rationing board. When we allow it to be bought and sold by private agreement, we are, within certain limits, allowing individuals to set their own legal relations with regard to coal;

see also Patterson, *supra* note 59, at 945 ("In a modern 'free-enterprise' society . . . a legal rule that bargained for promises are enforceable serves to support and to reinforce the use of contract as an economic device, and thus serves the needs of society"); Samuel J. Stoljar, *The False Distinction Between Bilateral and Unilateral Contracts*, 64 YALE L.J. 515, 535 (1955) (stating "[e]nforceable bargains, very broadly, are essential to operate our economic system"); K.N. Llewellyn, *What Price Contract?*, 40 YALE L.J. 704, 717 (1931) (explaining that a "[b]argain is then the social and legal machinery appropriate to arranging affairs in any specialized economy which relies on exchange rather than tradition (the manor) or authority (the army, the U.S.S.R.) for apportionment of productive energy and of product.").

Often comments such as these are read narrowly such that the institution of promising is justified as good for business the way an active chamber of commerce promotes a favorable business climate. Comparably, enforcement of promises is thought to rest on assumptions about models of business behavior rather than social structure. *See, e.g.*, Jane B. Baron, *Gifts, Bargains and Form*, 64 IND. L.J. 155, 183 (1989) (questioning the hegemony of assumptions such as: "[a]s business life requires trust, business promises ought to be kept."). At a competing pole, to sweep away the confused debris expressed by consideration doctrine, FRIED, *see supra* note 3, at 28-39, reduces exchange to bargain, bargain to the process of bargaining and then concludes that at best consideration doctrine makes sense only as reflecting "a distinct collective policy, the furtherance of economic exchange." *See id.* at 36. But then finding that people also promise in nonmarket settings he claims to have succeeded in demonstrating consideration's incoher-

Second, because each individual depends on another in exchange, the social relation presupposed by private exchange is reciprocal. Each person enters exchange to satisfy his or her needs and meets there another who does the same. Each exchanges her or his product or service as a means to obtain satisfaction of those needs. Each becomes a means for the satisfaction of another's needs and reciprocally uses the other as a means to satisfy his or her own needs. For this reason, transfers of goods and services that are not reciprocated normally function neither to accomplish the total distribution of aggregate goods and services nor to reproduce the social relations of interdependent autonomy presupposed by private exchange.

Third, it is a defining characteristic of private exchange that each engages in exchange only by recognizing the autonomy of the other. Neither uses the other, nor the goods and services of the other, without consent. Thus, the autonomy of each person entering exchange is reciprocally presupposed. Less noticed, the autonomy of each is also reciprocally constituted by exchange. The capacity of individuals to reproduce themselves separately from others is materially constituted insofar as each person entering exchange obtains by this means those goods and services essential to his or her own survival and capacity to subsist as before. The homeowner buys pipe to repair the plumbing; a factory buys raw material to replenish its supply. Equally significant, each determines to enter the exchange voluntarily and does so by relinquishing voluntarily the autonomy presupposed. The decision at once exercises and constitutes autonomy because the necessity for one person's volitional act is established by the other's recognition of it. The significance of this can be underscored by recalling that in both Roman and antebellum American law a slave, and at common law a married woman, could not contract. Neither could obtain what he or she needed through exchange. Both served the ends of others, but neither could use another in exchange as a

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ence.

In fact the institution of promising must be located at a deeper level of social analysis. The underlying structures that characterize a market economy distribute individuals into circumstances of private autonomy. But although formal independence describes one aspect of their social relations, they are not self-sufficient and therefore are actually dependent on the social connection that exists in the distribution of their labor into different specialized activities. They must exchange to meet the totality of their needs. Everyone must find a bridge of social interconnection leading from the island of autonomy, confronted as given, to exchange. Business and commerce reflect, as well as constitute this underlying social structure. But it would trivialize foundational relationships to argue that promises are enforced because, in currently fashionable soundbitespeak, "they help grow the economy."

means to his or her own satisfactions. In neither case could exchange be a vehicle for constituting either's autonomy as a person.[87]

Fourth, given the structure of interdependent autonomy, promises that are given in exchange facilitate social reproduction. Such promises may emerge any time one performance takes time and the other does not. They allow for goods to be delivered without payment or payment to be made before delivery. They allow for a market source or outlet to be arranged before production. They respond to the needs of business for careful planning. Referring to the increased importance of promising in the late eighteenth century, Atiyah wrote:

> Now in the highly volatile commercial and industrial activity I have described . . . it does not seem surprising that businessmen came to demand a greater degree of legal protection for careful planning. Vast sums of money depended on the skill with which men could now plan; the mill owner needed to buy his supplies of cotton in advance, so that it would be available in a continuous flow; he needed to be assured of his labor supply in advance for the same reasons.[88]

Horwitz argued that through the eighteenth century extensive markets did not exist and goods were not considered fungible but that this began to change as exchange became widespread enough to give rise to the use of contracts for price speculation.[89] Promise became a means of allocating risk:

> The absorption of commodities transactions into contract law is a major step in the development of a modern law of contracts. As a result of the growth of external markets, 'futures' contracts became a normal device either to insure against fluctuation in supply and price or simply to speculate.[90]

Marx suggested institutions such as promising emerge within the framework of capitalist production as a way to curtail the time commodities spend in circulation. According to his analysis, time spent in circu-

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[87] Personal autonomy is a foundation and achievement of a market economy. Notice, however, the implication of the above: I relate to my own activity and to others as means and it is in this process that my autonomy and theirs is constituted. I do not treat either others or my own activity as ends in themselves. Is it utopian to think that human autonomy could rest on a more expansive foundation, one, for example, that considered the unfolding of an individual's capacities and powers as an end in itself? Or that I could relate to others as Aristotle enjoins us to relate to friends—"for their sake." *See* ARISTOTLE, *supra* note 68, at 1827. In any event, these aspirations are inconsistent with the foundation of private exchange.

[88] *See* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 421 (1979).

[89] *See* Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 920, 923 (1974).

[90] *Id.* at 941.

lation is time lost to production.[91] To that extent circulation constitutes a barrier to production. As a consequence, mechanisms develop tending to reduce the costs of circulation to zero.

Consider this example: If a capital of $100,000 is invested in the production of goods that take three months to produce and another three months to sell, then the original sum invested can be turned over twice in the year. If the profit is $10,000 with each turnover, then a profit of $20,000 can be derived from the investment. By contrast, if by contract goods can be sold as soon as they are produced, the same capital can be turned over four times a year. At the same profit per turnover, a total profit of $40,000, rather than $20,000, will be generated in the course of a year for the same $100,000 invested. Marx wrote:

> The expansion and contraction of the time of circulation operate therefore as negative limits to the contraction or expansion of the time of production or of the extent to which a capital of a given size functions as productive capital. The more the metamorphoses of circulation of a certain capital are only ideal, i.e., the more the time of circulation is equal to zero, or approaches zero, the more does capital function, the more does its productivity and the self-expansion of its value increase. For instance, if a capitalist executes an order by the terms of which he receives payment on delivery of the product, and if this payment is made in his own means of production, the time of circulation approaches zero.[92]

That is, by promising I can realize most fully the tendency to reduce the costs of circulation to zero—if by promising the producer produces to the buyer's order, then the goods are exchanged as soon as they are produced. No time at all is spent idly in the market. Marx concluded: "[T]he struggle against [circulation time]. . . belongs to the specific economic development of capital and provides the impulse for the development of its forms in credit, etc."[93] In other words, the tendency to reduce circulation time to zero is a source of the impulse to promising in an evolving industrial economy. By reducing the time spent in circulation, more time may be devoted to profit and production.

If the analysis just given is correct, we would expect to find promising in connection with exchange at all levels of the latter's development as an economic institution, but we would not expect promises to be a significant factor in legal development until production had developed sufficiently to become production specifically for exchange. More spe-

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[91] *See* 2 KARL MARX, CAPITAL 121-28 (1967).

[92] *Id.* 2 at 125.

[93] *See* KARL MARX, *Economic Manuscripts of 1857-1858 (Grundrisse)*, *in* 28 KARL MARX & FREDERICK ENGELS, COLLECTED WORKS 5, 467 (1986).

cifically, we would expect production to have developed sufficiently so that circulation was a barrier to it. If the dominant form of production is agriculture and each productive unit is largely self-contained such that only surplus over whatever is necessary to maintain the household is sent to market, then the rhythm of production is not geared to exchange, and circulation cannot be such a barrier. Social reproduction does not depend on market exchange. On this basis, Rome's failure to develop the general enforcement of promises can be explained: production for exchange never became the dominant productive form and circulation never developed as a barrier to production and investment return.[94] For the same reason, although common-law courts enforced the exchange of a promise for a promise as early as the mid-Sixteenth century,[95] this did not become a significant feature of either English or American law until the late Eighteenth century.[96] But with the industrial revolution, production of

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[94] According to ALAN WATSON, THE EVOLUTION OF LAW 23 (1989), coined money was a relatively late introduction to the Roman economy (arguing, however, that legal tradition was decisive for the evolution of Roman contract law).

[95] Baker, *supra* note 70, at 346 suggests that an action to enforce mutual promises may appear as early as 1517 in *Fyneux v. Clyfford*, KB 27/1026, m.76 (1517), and in any event, he establishes a reported discussion of consideration as the exchange of mutual promises by the mid-sixteenth century in *Lucy v. Walwyn*, KB 27/1198, m. 183 (1561-1563).

[96] FARNSWORTH & YOUNG, *supra* note 17, at 47, ask:

> How could England have reached the end of the sixteenth century before giving, in *Strangborough v. Warner* [74 Eng. Rep. 686 (1588)], legal recognition to exchanges of promises that were not partly performed. Apparently this development was even slower in coming in America. According to one legal historian, 'the primitive state of eighteenth century American contract law is underscored by the surprising fact that some American courts did not enforce executory contracts where there had been no part performance . . . .The pressure to enforce such contracts would not be great in a pre-market economy where contracts for future delivery were rare. . . .'

(citing Morton J. Horwitz, *supra* note 90, at 929-30).

The argument in the text above suggests that the impulse-driving promising was not sufficiently formed; lacking a sufficiently intensive elaboration of the social division of labor, production for exchange had not developed to the point where circulation was a barrier to it. Although KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 162-67 (1990), emphasizing A.W.B. Simpson's critique in *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979), disagrees with the Horwitz thesis of a primitive eighteenth century contract law insofar as executory contracts were enforced by the late seventeenth century in America, expectation damages were awarded and both the English and colonial American economies were complex and sophisticated. Teevan nonetheless concluded:

> As a final thought on the matter of the continuity of American contract law from colonial days to the republican period, it must be acknowledged that, although the legal doctrine was in place for the enforcement of executory contracts and the recovery of expectation damages by the eighteenth century, commercial practices were not as planning-oriented in either the

commodities for exchange flourished. Now every minute lost in circulation was wasted to profit and reinvestment and the need for a reliable institution of promising became essential.

Fifth, promises cannot emerge in connection with private exchange without the development of a system of coercion to enforce them. Precisely because each producer is autonomous, each must consider his or her own self-interest in exchange. Promises involve cooperative projects over time. Cooperation expressed in contracts reflects a coincidence of self-interest on the part of the contracting parties. But what was in my self-interest today may not be tomorrow. Yet if in self-interested attention to my own capacity for material survival from day to day, I do not perform as I have promised, the material reproduction of another is compromised. Because the production and distribution of aggregate goods and services depends on precisely such exchange, social reproduction is compromised as well. As a result, the potential for individual harm is redressed by law to assure social reproduction. The coercive obligation of a promise has its source in the need to reproduce the relations of interdependent autonomy on which market exchange depends.

Summarizing, a promise means an intention to constrain choice in the future. The promisor commits herself to act as she has promised and not otherwise. This offers a foundation to which social obligation can attach. The performance that the promisor has promised can be compelled. Social obligation does attach in order to facilitate exchange and the reproduction of the social relations of interdependent autonomy. Exchange is the bond of social interconnection between autonomous persons and is essential to the distribution of aggregate goods and services in society. Without this process, social reproduction fails. The reproduction of interdependent autonomy is accomplished through individual, specific, and reciprocal acts of private exchange. Each person uses his or her own production as a means to obtain the production of others in exchange. In so doing, each recognizes the autonomy of the other and the autonomy of each is constituted by this exercise and recognition. Promises facilitate this process by allowing for a disjuncture between the performance of one and the performance of the other, by accommodating planning, by allocating risks, and by tending to reduce the costs of circulation. Be-

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> colonies or England as they would become in the nineteenth century when there would be an increased division of labor and a greater vulnerability to market swings. Since market forces were not as strong as they would be later, it is probably true that the paradigmatic mode of exchange in the mid-eighteenth century was a partially executed contract, and there was therefore not a great need then for enforcement of executory contracts or the recovery of expectation damages.

TEEVAN, *supra*, at 166.

cause, however, promises represent a coincidence of self-interests and self-interests do not change synchronously, but may diverge over time, the institution of promising can function to facilitate the social reproduction of interdependent autonomy only if the social obligation of promise is coercive. The institutions of promising in this context depend on a developed system of law.

3. Which Promises Bind

If promises are enforced because they facilitate exchange and if we define bargain, consistent with the *Restatement*, as a relationship that involves a promise on at least one side, we would expect bargains that look to exchange to be enforced. But when we ask which promises will be enforced, the question is ambiguous: we may be asking a question about the nature of the social structure—what kind of promises are enforced in a given society; or we may be investigating individual agency—may we enforce a specific promise because of what a particular individual has done or not done.[97] Unless these distinct questions are disentangled we

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[97] *Cf.* H.L.A. HART, *Legal Responsibility and Excuses*, *in* PUNISHMENT AND RESPONSIBILITY 39-40 (1968). Professor Hart distinguishes between the social function of obligation and personal responsibility necessary to establish grounds of liability in criminal law. If, for example, unconsented exchange accomplished by force compromises social life, then we may criminalize it. But this is a separate question from whether an individual bears personal responsibility for a particular violation of this norm. Hart writes:

> What we need to escape confusion here is a distinction between two sets of questions. The first is a general question about the moral value of the laws: will enforcing them produce more good than evil? If it does, then it is morally permissible to enforce them by punishing those who have broken them, unless in any given case there is some 'excuse.' The second is a particular question concerning individual cases: is it right or just to punish this particular person.

Id.

By answering the second question we ensure that "there must be a 'voluntary' action if legal punishment or moral censure is to be morally permissible." *Id.* at 40. In criminal law, the requirement of a voluntary action is tested not only by the absence of excusing conditions, the subject's of Hart's essay, but also by the affirmative requirement of an act causing the law to be broken.

In analyzing contract formation Professor Melvin Aron Eisenberg in *Principles of Consideration*, 67 CORNELL L. REV. 640 (1982), provides a distinction similar to the one Hart makes above, but restricts the question of individual attribution to matters of defense only:

> To achieve clear thinking about the principles that determine what kinds of promises the law should enforce, these principles must be based on the social desirability of enforcing various categories of promise taken at wholesale. Questions concerning the quality of individual promises—questions relating to issues such as fraud, duress, mistake, or unconscionability—should then be dealt with at retail, through case-by-case application . . . . Putting the problem in the language of civil procedure, the principles that address the enforceability of promises should determine whether

cannot properly analyze the way in which consideration functions to establish grounds of liability in contracts.

a. Promise, Bargain, and Exchange

Attention to the structure and dynamic of social reproduction identifies the social interest to be secured. Given social relations of interdependent autonomy, exchange distributes goods and services to need. In turn, bargains are enforced because they facilitate the reproduction of consensual exchange on which a market economy depends. But bargains are not enforced unless they may be attributed to the parties to a prospective exchange. No one is forced by law to bargain, although, because of the social division of labor, each is forced by circumstance to enter exchange. If we ask whether a particular bargain promise is to be enforced, we must evaluate those factors that make it appropriate to impose obligation on specific individuals.

The social form of bargain makes this possible insofar as it functions to establish a specific mode of connection between the social structures of exchange and the individual activity of promising. The social relations presupposed by human action provide the forms within which individual activity is possible—cashing a check presupposes a credit system; having a wedding, the institution of marriage; even tilting at windmills presupposes the social forms of knight errantry. Bargain is a social form presupposed by persons who promise. It gives expression to the patterns of conduct individuals tend to follow in using promises to exchange. Thus, bargaining functions to connect the promisor's reasons for promising and the social imperatives of the institution of promising. It establishes what must be done to follow the role of a person who bargains in order to exchange.

Actual performance transforms the world. Goods that were there are now here; a lot that was vacant contains a towering structure. By contrast, an exchange of promises does not in and of itself entail any such transformation of physical things. That is, paralleling the distinction between performance and promise is a distinction between social structures of material transformation that characterize an exchange of performances and social structures of meaning and expectation that characterize bargain. For this reason, although exchange will inevitably carry a

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breach of a given type of promise gives rise to a legal complaint. Issues concerning the quality of individual promises should then be matters of defense.

Id. at 641.

In the argument that follows, I show that insofar as consideration involves issues of attribution, the quality of individual promises concerns matters of contract formation, not matters of defense only.

broader meaning in ordinary usage, it is helpful to restrict its use in analysis to an exchange of performances, what Llewellyn refers to as "an ultimate juice of real performance."[98]

Because bargain, like promise, does not in and of itself entail any necessary transformation of the physical world, it is best understood as a social form whose reality is in its meaning.[99] The parties to a bargain co-author an exchange and through bargain conjointly cause it, but bargain itself involves an exchange of commitments, not an exchange of performances. Instead of transforming the world, bargain transforms social structures of expectation. In so doing it lays the foundation for enforceability. Earlier I argued that the commitment of a promise did this: by expressing an intention to constrain herself in the future, a promisor made a commitment to which social obligation could attach and the commitment could be enforced. As a social form for the reciprocal exchange of commitments, bargain establishes just this mode of connection between individual activity and social obligation. Where a bargain can be attributed to the parties who have made it, it can be enforced. In this fashion, it becomes a means for resolving the contradiction implicit in the social cooperation of formally autonomous individuals. An individual uses bargain as a means to realize his or her purposes in the world, as a means to accomplish an exchange of actual performances. In order that such projects not be defeated by the failure of one or the other party to perform in accordance with the commitment given, bargain establishes a manner of attributing social obligation to those who bargain.

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[98] *See* Llewellyn, *supra* note 71, at 791.

[99] Meaning is a social form that depends on structures of communication such as language, and its reality, as with other social forms, can be established by the use of causal criteria. *See* RR, *supra* note 5, at 69, explaining:

> It is important to note that science employs two criteria for the ascription of reality to a posited object: a perceptual and a causal one. The latter turns on the capacity of an entity whose existence is in doubt to bring about changes in material things. It should be noted that a magnetic or gravitational field satisfies this criterion, but not the criterion of perceivability. On this criterion to be is not to be perceived, but (in the last instance) just to be able to do.

From this it follows that

> [t]he *sui generis* reality and causal efficacy of social forms, on a strictly physical criterion, in terms of their making a difference to the state of the material world which would otherwise have occurred (from soil erosion and acid rain through to the production of some rather than other noises and marks), has to be recognized.

PIF, *supra* note 5, at 70-71.

If we accept causal criteria for testing the reality of things, meanings can be known to be real. Words are said, a door is slammed. Had the words been interpreted differently, the door would be differently situated than it is.

RESTATEMENT SECOND OF CONTRACTS § 71, expresses the elements connecting the individual activity of promising with the social forms presupposed. To establish consideration, an act or promise must be bargained for. To be bargained for, the act or promise given in return must be sought after by the promisor and given in exchange by the promisee. Comment b to the text explains this as requiring that "the consideration and the promise bear a reciprocal relation of motive or inducement; the consideration induces the making of the promise and the promise induces the furnishing of the consideration." In fact, these requirements recall familiar standards of common law imputation[100]—act, state of mind, and a connection between act and result—and it is an important feature of the bargain theory of consideration to lay bare such relationships. In order to establish an enforceable bargain: (1) both parties to the transaction must manifest a commitment to exchange by promise or performance;[101] (2) both must intend to exchange; and (3) each must induce the other by her or his manifested commitment such that they become co-responsible for the bargain.[102] Where these elements are

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[100] *Cf.* H.L.A. HART & TONY HONORE, *Preface to the Second Edition, in* CAUSATION AND THE LAW xlii-xlvii (2d ed. 1985). Hart and Honore summarize three criteria that have been used "in legal systems up to now" to ground legal responsibility: (1) conduct, (2) causal connection to harm, and (3) fault. *See id.* at xliv. Thus, either conduct alone can be shown, or conduct and fault, or conduct causing harm, or all three, or none. But this is in the perspective of wrongful breach of established obligations such as the prohibitions of crime or torts or the duties of existing contracts.

By contrast, with contract formation we are concerned with responsibility for creation of legal obligation. Nonetheless, the criteria remain essentially the same, though with these differences: (1) because the parties must become co-responsible for a bargain, in order for it to be attributed to them the connection between their acts of commitment must be one of reciprocal inducement, not causation; (2) rather than the more general concept of fault, intent is the relevant state of mind; and (3) exchange is a social interest to be secured, not harm to be prevented. But once the parties have committed to a reciprocal exchange then breach can be analyzed in traditional terms: the function of bargain is to cause exchange, a social good; given bargain, breach of the commitment that gave rise to it can be characterized as conduct causing harm.

Interestingly, Hart and Honore's last permutation of conduct, fault and causation—the category in which none of these need be shown for liability—can be established only by ignoring grounds of responsibility for the creation of a legal relationship. They instance persons who guarantee debts or insure against peril as examples of defendants who become responsible for harm although neither conduct, fault, nor causation need be established to ground liability. But no such person can be liable unless she has given an enforceable promise. For this to happen, conduct, a requisite state of mind and a nexus of reciprocal inducement must be shown. Comparable criteria to those they have identified remain present, but in the creation of the relationship of obligation rather than in its breach. *See id.* at xlvi.

[101] As always, I use "act" or performance to include forbearance.

[102] I argue that the bargain must be attributable to both parties. This has nothing to do with the question of mutuality of obligation. Attribution occurs as a consequence of the commitment to relinquish autonomy. The power to refuse obligation is surrendered.

fulfilled, the bargain may be attributed to the parties to it. Acts of individual human agency become capable of reproducing social structures. Without circularity, promises that facilitate exchange may be imputed to the individuals who made them and enforced.

b. Manifested Commitment by Promise or Performance

The requirement of a volitional act as a precondition to legal liability is a core principle of Western liberalism.[103] Lord Coke, who in the Sixteenth century defined consideration as a charge to the promisee or a benefit to the promisor,[104] spoke also in broad language about the necessity for "some open deed tending to the execution of his [the accused's] intent"[105] before liability to criminal punishment could be established. The requirement of a promise or performance in *RESTATEMENT SECOND* § 71 also establishes "some open deed" as a basis for attributing legal responsibility. Comparable to equivalent requirements in crimes or torts, the necessity for an act imposes a test of volition because this is inherent in every act: to have acted one must have been free to do otherwise. It is the opportunity to do otherwise that is relinquished in committing oneself to a bargain by promising or performing.[106] A party may give up the right to smoke or drink,[107] or to sue,[108] or to compete,[109] or

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Each person who has committed to relinquish autonomy thus becomes subject to legal obligation, but that is quite separate from the question of whether he or she has incurred legal obligation. *See* RESTATEMENT (SECOND), *supra* note 71, § 45 (stating that an option contract created by an offer of a promise for performance binds the promisor when the offeree begins performance, but does not bind the offeree); *infra* note 181 and accompanying text.

[103] *See, e.g.*, HERBERT MORRIS, FREEDOM AND RESPONSIBILITY 105 (1961) ("'An act is essential for criminal and civil liability.' Some consider this principle a cornerstone of our liberties."); OLIVER WENDELL HOLMES, THE COMMON LAW 46 (1963) ("[t]he reason for requiring an act is, that an act implies a choice, and that it is felt to be impolitic and unjust to make a man answerable for harm, unless he might have done otherwise"); MICHAEL MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 4 (1993) ("there can be no criminal offense without the doing of a voluntary act."). The premise is the basis of H.L.A. Hart's conception of law as a "choosing system." *See supra* note 98, at 44; *see also* HART and HONORE, *infra* note 123, at lxxx-lxxxi (observing that individuals understand themselves as distinct persons in consequence of the changes their actions bring about in the world).

[104] *See* Stone v. Wythipol, Cro. Eliz. 126 (1588) ("every consideration doth charge the defendant in an assumpsit must be to the benefit of the defendant or charge of the plaintiff, and no case can be put out of this rule"); A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 487 (1975).

[105] SIR EDWARD COKE, *Third Institute*, *in* WAYNE R. LAFAVE & AUSTIN W. SCOTT, HANDBOOK ON CRIMINAL LAW 423 (1972).

[106] *Cf.* Burton, *supra* note 17, at 377 (explaining bad faith as an effort to recapture opportunities foregone on entering into a contract).

[107] *See* Hamer v. Sidway, 27 N.E. 256 (N.Y. 1891).

[108] *See, e.g.*, Fiege v. Boehm, 123 A.2d 316 (Md. 1956).

promises to deliver hides,[110] or to fix a nose,[111] or to deliver natural gas.[112] What before could be done can no longer be done, and insofar as choice surrenders alternatives, it involves not only an exercise of autonomy, but also a commitment to relinquish it. The requirement of a promise or performance, therefore, tests for a rudimentary minimum of volitional conduct to ground the imposition of legal liability. Each party must make a manifest decision to embrace exchange.

For a promise to meet this test it must be a true rather than an illusory promise. An illusory promise cannot ground obligation because it does not constrain, even in its meaning, a person's power to do otherwise. "I promise to meet you on Saturday if I care to" leaves the promisor free to do one thing or another. It is not a true promise. It does not commit to exchange. According to the Comment to RESTATEMENT SECOND OF CONTRACTS § 77: "words of promise which by their terms make performance entirely optional with the 'promisor' do not constitute a promise."[113] In the analysis above, I explained that the mode of connection between the individual act of promising and the social forms of promising was established by the commitment of a promise. While social reproduction generates a tendency to enforce bargain promises, it is the commitment of a bargain promise to which social obligation can attach. But where performance is entirely optional, there is no commitment to give enforcement life. *Strong v. Sheffield*[114] offers an example. In *Sheffield*, the wife offered to guarantee her husband's debt if his creditor would forbear from proceeding against him legally. The creditor said that he would forbear "until such time as I want my money."[115] The court treated this promise as illusory, a promise of the "I will if I want to" variety, and held it to be incapable of constituting consideration.

c. The Intent to Exchange

If it is true that intent does not ground liability in contract without an overt manifestation in promise or performance, it is equally true that neither a promise nor performance is sufficient unless accompanied by an

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[109] *See, e.g.*, Central Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28 (Tenn. 1984).

[110] *See* Laredo Hides Co., Inc. v. H&H Meat Products Co., Inc., 513 S.W.2d 210 (Tex. Ct. App. 1974).

[111] *See* Sullivan v. O'Connor, 296 N.E. 2d 183 (Mass. 1973).

[112] *See* Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33 (8th Cir. 1975).

[113] RESTATEMENT (SECOND), *supra* note 71, § 77.

[114] 39 N.E. 330 (N.Y. 1895).

[115] *Id.* at 331.

appropriate state of mind. The act committing each party to an exchange must be "actuated"[116] by an intent to exchange.[117]

In the *Restatement* formulation the intent to exchange is captured by consideration being "sought after by the promisor" and "given in exchange" by the promisee.[118] The promisor must seek the act or promise offered by the promisee and the promisee must commit to obtain the performance promised by the promisor. The intent required here can be characterized more particularly by considering the nature of a bargain. Adam Smith's definition offers a first approximation:

> Whoever offers to another a bargain of any kind, proposes to do this: Give me that which I want, and you shall have this which you want, is the meaning of every such offer; and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of.[119]

The intent present is a double intent: on the one hand each party must have an intent to obtain something by means of exchange; on the other hand each party must have an intent to give in order to obtain. Thus, the intent to exchange includes an intent to obtain and an intent to induce. Moreover, these are reciprocally symmetrical in the following sense: the promisor's intent to obtain must be matched by the promisee's intent to induce and the promisee's intent to obtain must be matched by the promisor's intent to induce. Fixing thought with an example: if the promisor intends to obtain another's umbrella for $10, then the promisee must intend to induce the promisor's surrender of $10 by committing to deliver an umbrella; equally the promisor must intend to induce the commitment to deliver the umbrella by committing to surrender $10.

For either party, the intent to exchange "actuates" a promise or performance by causing it. Although they deny the efficacy of reasons as causes, in the following passage Hart and Honore capture the significance of the changes an individual makes in the world to our conception of ourselves as centers of causal power:

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[116] The word is from LEFAVE & SCOTT, *supra* note 105, § 34 at 237: there must be a concurrence of the mens rea with the actus reus "in the sense that the mental state actuates the act or omission." For a bargain, the intent to exchange must actuate the act or promise committing each party to the bargain.

[117] Corbin observed the significance of asking the purpose for which a promise was made. He identified "a desire for objective conduct of another person" as that which induced the promisor to offer her own promise in order to obtain the performance of the other. *See* Corbin, *supra* note 70, § 115 at 502 (1963). E. ALLAN FARNSWORTH, CONTRACTS (2d ed. 1990) makes the point central to his analysis. *See infra* notes 131-132 and accompanying text.

[118] *See* RESTATEMENT (SECOND), *supra* note 70, § 71.

[119] A. SMITH, *An Inquiry into the Nature & Causes of the Wealth of Nations* 11 (1811 ed., bk.1, ch. II), *in* FARNSWORTH & YOUNG, *supra* note 17, at 53.

> Individuals come to understand themselves as distinct persons, to whatever extent they do, and to acquire a sense of self-respect largely by reflection on those changes in the world about them which their actions are sufficient to bring about without the intervention of others and which are therefore attributable to them separately. This sense of respect for ourselves and others as distinct persons would be much weakened, if not dissolved, if we could not think of ourselves as separate authors of the changes we make in the world.[120]

To be author of a change is to cause it, and therefore Bhaskar argues that reasons, in the broad sense of the mental predicates of action, must be causes if we are to make sense of our activity.[121] In action we codetermine the future and this, he argues, must be understood causally: "it is a necessary condition for the concept of action that the world is open, in the sense that the agent's activity makes a difference to the state of affairs that would (normally) otherwise have prevailed."[122] In other words, what a person does happens because of, not in spite of his or her reasons for acting, even if those reasons also remain obscure to the actor.[123] Further, it is only if we are the cause of some of our bodily

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[120] HART & HONORE, *supra* note 100, at lxxx-lxxxi. Hart and Honore argue that because reasons are defeasible, the way they bring about action cannot correspond to Mill's Humean account of causation. The connection between reasons and causes does not correspond to a constant conjunction or invariable sequence between cause and effect: "to assert that one event is the cause of another is indirectly to assert that events of one kind are invariably followed by events of the other." *Id.* at 21. In interpersonal transactions like bargain where one person acts at least in part because of reasons offered by another, such invariable sequences do not apply. *See id.* at 51-57. A threat can provide a person with a reason for compliance on one occasion and yet an equivalent threat may provide the same reason on a second occasion and the same conduct need not occur. *See id.; see also* ANTHONY KENNY, FREEWILL AND RESPONSIBILITY 28-29 (1988) (arguing that because reasons are defeasible and causes are not, reasons cannot be causes). But this objection fails once we acknowledge that the world is an open, not a closed system, and that causal laws must be understood as tendencies, not invariances. In open systems, causes, as well as reasons, are defeasible in one sense that they may be overridden by the operation of other mechanisms. *See* PON, *supra* note 5, at 83-90 (countering objections to the proposition that reasons are causes).

[121] *See* PON, *supra* note 5, at 90, and compare it with what Professor Moore calls "the mental cause thesis." *See* MOORE, *supra* note 104, at 45 ("bodily movements must be caused by a certain mental event or state"). A full symposium on Moore's work, reviewing, inter alia, this issue, is presented at *Act & Crime Symposium,* 142 U. PA. L. REV. 1442 (1994).

[122] PON, *supra* note 5, at 114.

[123] *See id.* at 112:

> [T]he agent may be unaware of the springs and internal conditions, as well as the external conditions and consequences of his/her intentional activity. For though it is analytic to the concept of an intended act that the agent believes his/her act to possess a certain quality (for the sake of which it is performed), it is not analytic that he/she can say, is conscious of, or 'knows' what this quality is.

movements, not others, that a distinction can be maintained between what we do (catching a bus) and what happens to us (catching a cold). Bhaskar writes: "intentional human behavior is caused, and . . . it is always caused by reasons, and . . . it is only because it is caused by reasons that it is properly characterized as intentional."[124] He therefore defines a real reason as "a reason possessed by some agent X at [time] t which was causally efficacious in producing (bringing about) X's behaviour at t."[125]

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[124] *Id.* at 89. Thus, in *Carlill v. Carbolic Smoke Ball Co.*, 1 Q.B. 256 (1893), in which a smoke ball company promised £1000, if anyone were to use the smoke ball for two weeks and catch a cold, catching a cold could constitute neither consideration nor acceptance because it is something that happens to a person, not something a person does.

[125] PON, *supra* note 5, at 92. Bhaskar's argument vindicating our common sense notion that reasons are causes, rests on the distinction made possible here between real and possible or pretended reasons. I can possess a reason for doing a thing and yet that reason not be the reason why I did it. Bhaskar's point is that the distinction offered depends on the category of causality. Further, because the distinction between a real reason and a pretense is necessary to self-reflexive awareness of what we do, the causal efficacy of reasons is a condition of any discursive (non-intuitive) thought.

First, activity characterizes our existence and action consists in making a difference to the states of the world that exist. Moreover, we are conscious of our causal interventions in the world and self-reflexively monitor what we do. But we also monitor our monitoring; that is, we are aware of our past or present interventions and can comment on them, or we can comment on interventions we imagine for the future. The capacity for self-awareness, which characterizes our consciousness, means also that we can describe what we do (in all its tenses) incorrectly. Or we can be in error and self-doubt about our commentary on what we do. I can say that a particular set of beliefs was the reason for my behavior, but be wrong. I may have acted for other reasons and be confused about them (or dissembling).

Now the distinction between a real reason and pretense makes sense only if one set of reasons actually caused my action but the other did not. The phenomenon of rationalization also can be explained only if some of my states of consciousness produce behaviors but others do not. It follows that the capacity for error and self-doubt, intrinsic to the capacity to hypothesize and learn, depends on the causal efficacy of some of our mental states but not others.

The fact that we evaluate or appraise different beliefs in order to decide what to do leads to the same conclusion. If reasons make a difference, then they count as a cause; if they do not, then appraisal is pointless. Similarly, the distinction between actually following a rule and pretending to rests on the fact that when I actually follow a rule it provides a reason for my conduct and when I do not, it does not. But if a rule makes a difference to what I do, it is causally efficacious. For Bhaskar's full argument, see PON, *supra* note 5, at 80-119. For his canvas of philosophical objections to the proposition that reasons are causes, see PON, *supra* note 5, at 83-90. For a somewhat less closely-reasoned presentation of the difference between actually following a rule and only pretending to, see Lucy's announcement to Linus that she will read the rules of a board game they are about to play. "Good! I love the rules," Linus answers. "Once you know the rules, you can cheat. What I always say is you can't really cheat unless you know the rules. That's what I always say." Charles M. Schulz, *Peanuts*, LOS ANGELES TIMES, July 11, 1995, at E6.

From this we can observe how the intent to exchange is a consequence of the social structure of exchange. On the one hand, an individual entering exchange has a causally efficacious reason to obtain objects of need: her autonomy is not self-sufficient. A person is driven to exchange by what she lacks.[126] The exchangist there finds in another the capacity to satisfy those needs. The capacity of the other to satisfy need provides reason for acting, and the exchangist's behavior is caused by this belief. Insofar as it facilitates the distribution of aggregate goods and services to need, the intent specific to exchange includes an intent to obtain.

But an individual does not obtain by taking. That is, if the individual autonomy presupposed by exchange is to be reproduced, then each must respect the autonomy of the other. Each offers his or her own performance to obtain the performance of the other. Nothing is taken without the other's consent. Respect for autonomy means an individual's own reasons for action must cause his or her action, and another who wishes to induce such action must appeal, one way or another, to those reasons. For the promisor this means she must make the prospect of the other's promise or performance the cause of her promising; reciprocally, the promisee must make the promisor's commitment the cause of his return promise or performance. Pursuing the example given above, the promisor makes the prospect of an umbrella her reason for promising and the promisee makes the commitment to pay $10 his reason for giving consideration. Each exercises an intent to induce and has a real reason to do so; he or she must respect the autonomy of the other.

The twin consequence of the above is that a person's manifestation of a commitment to exchange, whether expressed by promise or performance, is caused by an intent to obtain and an intent to induce. The next section develops the analysis of inducement required for an enforceable bargain promise. In what follows, I show how an intent to obtain functions in traditional consideration analysis.

Suppose a promisee takes up a promisor's promise and makes it a causally efficacious reason for action—the promisee delivers an umbrella. But suppose further the promisor did not seek to obtain the other's act. Whatever promise the promisor made was not made to obtain an umbrella. It is traditional doctrine that consideration fails. In a well-known example, a brother-in-law [promisor] offered his sister-in-law [promisee] a place to live on his ranch after her husband's death.[127] The sister-in-law acted to take advantage of this offer by moving to the ranch, but he

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[126] *Cf.* SRHE, *supra* note 5, at 127 ("Real reasons are the wants that prompt motivation and, *ceteris paribus*, issue in action.").

[127] *See* Kirksey v. Kirksey, 8 Ala. 131 (1845).

later threw her out. Plainly, the sister-in-law made her brother-in-law's promise her own, made it a reason for action, and acted because of it. If the court is to conclude there is no consideration, as it did, then this must be because the brother-in-law did not seek her action or seek to obtain it. He had no intent to exchange. The prospect of her coming to live on his ranch was not a reason that caused his promise. He was willing to have her there but did not seek to have her there. Some sentiment that did not depend on his obtaining anything in return, such as altruism, could have been the reason for his action. If there is to be enforcement of this promise, then, it will not be on the basis of consideration, but instead on the basis of promissory estoppel.[128]

In the case just cited the promisor lacked the intent to exchange. But there is also no consideration if the promisee lacks the requisite intent. Thus, if the prospect of the other's action causes the promisor to use her promise to induce it, but the promisee did not seek to obtain the promisor's performance, there will be no consideration. The return of a prisoner without knowledge of the promise of reward is a classic example.[129] In delivering the prisoner unaware, the promisee lacks an intent to exchange.

Consideration will be found lacking if the promisor's promise was not a reason for the promisee's action because the promise was made after his action occurred. This is the problem of action in the past: the promisee may have hoped to precipitate a return promise, but the promisor cannot now intend to obtain what has already been given or done.[130] Here, if the promise is to be enforced, it must be under some form of the doctrine expressed in RESTATEMENT SECOND § 86—enforcement of a promise for a benefit previously received.

The presence or absence of an intent to obtain also provides a basis for distinguishing between an enforceable bargain promise supported by consideration and a conditional gratuitous gift. Emphasizing the centrality of purpose to consideration analysis,[131] Farnsworth underscores the

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[128] *See, e.g.*, Ricketts v. Scothorn, 77 N.W. 365 (Neb. 1898) (holding that a grandfather's promise of $2000 to a granddaughter hoping she would not have to work was not consideration—there was no intent to obtain—but that it could be enforced under the doctrine of estoppel).

[129] *See* Broadnax v. Ledbetter, 99 S.W. 1111 (Tex. 1907) (holding that the promise of a reward was unenforceable where plaintiff returned a prisoner without knowledge of it).

[130] *See, e.g.*, Feinberg v. Pfeiffer, 322 S.W.2d 163 (Mo. Ct. App. 1959) (holding that an employer's promise to reward a faithful employee for 37 years of service was unenforceable on that basis).

[131] *See* FARNSWORTH, *supra* note 117, §§ 2.9-2.10, at 61-68. "Unless the promisor's purpose is to induce in exchange a promise or performance, the promisor is not bargaining, and nothing that is given in return can be consideration." *Id.* at 62-63. The promisor must seek to induce action by the promisee, *see id.* at 52, and the promisee must act

care required to make this distinction by an example of an employer who promises an employee a gold watch for Christmas if the employee will stop by the employer's office to pick it up. Farnsworth explains that the employer's promise is conditioned as it would be if he were bargaining, but that consideration fails because the employer does not seek to obtain anything from the employee:

> [T]he employer is not bargaining for the employee's stopping by the office; in making the promise, the employer's purpose is not to obtain that action, but simply to make a gift of the watch. Stopping by the office is merely a condition of a gratuitous promise—an unenforceable gratuitous promise.
>
> Note that we do not ask: having decided to make the promise, did the promisor seek something in return? . . . Rather, the question is: did the promisor decide to make the promise in the first place in order to get something in return?[132]

In terms of the analysis above, the employee's stopping by the office was not a real or causally efficacious reason bringing about the promisor's behavior. For there to be consideration, the prospect of getting something in return must have brought about the promisor's promise. The intent to obtain must have been causally efficacious in producing it.

Holmes argued that "the same thing may be consideration or not, as it is dealt with by the parties,"[133] and posed the case of a person wanting a cask of brandy carried from Boston to Cambridge.[134] A truckman promises to carry the cask in consideration of the delivery of it to him. Does the delivery count as consideration? If it is done as a favor, Holmes says, no. But, he argues, there would be consideration if the truckman, "seeing his own advantage in the matter," offers as follows: "In consideration of your delivering me the cask, and letting me carry it, I promise to carry it."[135] First, Holmes emphasizes, the owner was not obliged to give up control of the cask; consequently, his doing so is "detriment in the strictest sense."[136] Second, there is reciprocal inducement: "The promise is offered in terms as the inducement for the deliv-

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in response to the promise and in order to take advantage of it, *see id.* at 66. "In other words, just as the *promisor's* purpose must be to induce an exchange, so the *promisee's* purpose must be to take advantage of the proposed exchange." *Id.*

[132] *See id.* § 2.9, at 64.

[133] HOLMES, *supra* note 103, at 229-30.

[134] *See id.* at 227-32. The example is taken from the facts of *Coggs v. Bernard*, 2 Ld. Raym 909 (1703), which did not concern liability in contract, but instead the liability of a bailee in tort.

[135] *Id.* at 231.

[136] *See id.* at 228-29.

ery and the delivery is made in terms as the inducement for the promise."[137]

Now "seeing his own advantage in the matter" is vague but in any of the usual narratives it is hard to see how the *delivery* of the cask is the *reason* for the truckman's promise. Whatever motivates the truckman to carry the cask, it is not the delivery of it to him. The prospect of delivery does not cause his promise. Thus, where the promisor has not taken up the prospect of the other's act as her own and made it a reason for her promise, the desire of the parties to treat the promisee's act as consideration would not transform the transaction. The same thing may be consideration or not as it is dealt with by the parties, but this must be understood in the specific sense that the prospect of the promise or performance offered in return must be the promisor's reason for promising. If it is not a reason causing the promisor's promise, then the return is not consideration no matter how else it is dealt with.

In giving a gift, a donor does not act to obtain something for herself but instead transfers goods or services to another unilaterally; as a consequence the donor lacks an intent to obtain. Thus, a donative promise may be reciprocated by a true promise, and yet the return promise not constitute the donor's reason for acting. Suppose a donor says, "I will give you Greenacre if you promise to accept," and the donee says, "I promise to accept." This latter promise is a true promise because the donee has promised not to do otherwise than he promised; even so, there is no consideration because the promisee's promise to accept Greenacre is a condition of the donor's act, not the object of it. It is not something the donor uses her promise to obtain.[138] The donor's promise may be caused by gratitude, remorse, etc., but it is not caused by a desire for anything the promisee can or will do. Thus, although the promisee assents to obtain the donor's gift, the desire for the promisee's assent does not cause the donor's act.[139]

A qualification at this point, however, is necessary. Human action is typically overdetermined and obtaining the other party's promise or performance may not be the only reason or even the principal reason

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[137] *Id.* at 231.

[138] *Cf. In re Greene*, 45 F.2d 428 (S.D.N.Y. 1930), *cited in* WILLISTON, *supra* note 70 § 112, at 380 n.6. The promisee was attempting to prove that a bankrupt's promise to deed a house to her was enforceable because she agreed to pay taxes upon accepting the house. According to the court: "It is absurd to suppose that when a donor gives a valuable house to a donee, the fact that the donor need pay no taxes or upkeep thereafter on the property converts the gift into a contract upon consideration." *Greene*, 45 F.2d at 430.

[139] *See* RESTATEMENT (SECOND), *supra* note 70, § 71, illus. 8.

animating either the promisor or the promisee.[140] What is required is the presence of a causally efficacious reason, not that such reason be exclusive. Moreover, the presence of such a reason is evaluated objectively. What counts as exchange is a reciprocal distribution of some portion of aggregate goods and services such that the dynamic of social reproduction is advanced. Wherever a person bargains to obtain money or goods and services with a market value and to do so commits to the surrender of a valuable performance of her own, the intention to obtain will be assumed. Courts do not interrogate the relative efficacy of a particular reason among the constellation of reasons that cause a person to act.[141] It is enough that there be a plausible reason present to explain the bargain.[142] In an example offered by Williston, *A* is motivated by friendship to sell his horse to his friend *B* for $100. Plainly, the promise will be enforceable even if money is not *A's* object.[143] By contrast, where social relations of exchange are not reproduced and where no plausible claim to the reciprocal distribution of goods and services can be made, then, with an intent to obtain missing, consideration will fail. In a market economy we observe literally anything exchanging for anything else; still, in ordinary circumstances, people do not surrender expensive estates in land to obtain peppercorns. In such a case, because an intent to obtain a peppercorn cannot plausibly be considered a reason causing one person to deed Greenacre to another, the distinction between a real and a pretended reason, a distinction made possible by the causal analysis of reasons for action, has bite.[144]

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[140] *See id.* § 81, cmt. b:

> Even in the typical commercial bargain, the promisor may have more than one motive, and the person furnishing the consideration need not inquire into the promisor's motives. Unless both parties know that the purported consideration is mere pretense, it is immaterial that the promisor's desire for the consideration is incidental to other objectives and even that the other party knows this to be so.

[141] As Justice Cardozo explained in *DeCicco v. Schweizer*, 117 N.E. 807, 810 (N.Y. 1917), "[t]he springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others."

[142] *See* FARNSWORTH, *supra* note 117, § 2.9, at 65 ("If the promise was made in connection with a transaction in the marketplace, the court usually assumes that it was part of a bargain.").

[143] To the same effect is Holmes's hypothetical of a painter who agrees to paint a portrait for $500 but is driven to do so by hope of fame; the promise is nonetheless enforceable because of the $500 given for it. *See* HOLMES, *supra* note 103, at 230.

[144] *Compare* RESTATEMENT (FIRST), supra note 70, § 84, illus. *to* Clause (a) (the promise to pay one dollar for an estate worth $5,000 is binding) *with* RESTATEMENT (SECOND), supra note 70, § 79, illus. 2 (a promise to pay $600 in three yearly installments is not rendered enforceable by one cent received as consideration).

Establishing consideration requires the promisee abandon at the threshold of exchange the coercive power Patterson referred to that any person has to refuse to relinquish property or perform services. It is the volitional commitment to surrender autonomy that is a precondition to holding the promise of the promisor binding. Interrogating the causal efficacy of the promisee's reasons for constraining himself in this way tests for a genuine exercise of autonomy consistent with the social division of labor. If the parties to a bargain have each taken up for their own the prospect of performance of the other and made it the reason for their reciprocal act or promise, then each has freely exercised the autonomy presupposed by exchange. By participating in exchange as a co-author of it, each gives existence to individual autonomy as a component of social structure.[145]

d. The Nexus of Reciprocal Inducement

Bargain offers a bridge connecting intentional agency and social structure. Insofar as commitment provides a basis for social obligation, enforceability can assure the reproduction of the social relations of exchange presupposed by bargain. Where an intent to exchange actuates both parties to commit to an exchange of performances, the basis for enforcement of their commitments exists. Nonetheless, to enforce a bargain because of these reciprocal acts of commitment, the efficacy of such acts in bringing it about must be shown. We ask whether the bargain is a product of the parties' acts and a result for which they can be held responsible. We will say it is where the commitment of each may be understood to induce the commitment of the other. The connection here is one of inducement rather than causation[146] because we presuppose human

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[145] *See* PON, *supra* note 5, at 34 ("Society stands to individuals, then, as something they never make, but that exists only in virtue of their activity.").

[146] In the paradigmatic case the connection between act and result is characterized by causation: the wrongdoer acted to cause harm. But such instances presuppose existing legal obligation: an act that causes the death of a human being presupposes the legal prohibition on killing another. For an analysis of consideration, relations of legal obligation are not presupposed, but instead are the consequence of the parties' manifested commitment to relinquish autonomy. It is the bargain created by the parties as their common product that establishes obligation and it is their conjoint action within the framework of bargain that causes exchange. But where bargain does not cause exchange because one of the parties fails to perform in accordance with her commitment, the bargain, attributable to them jointly, will be enforced. In other words, the harm to be prevented is that of not exchanging in accordance with one's bargain.

At this point there is legal obligation and breach, and traditional causal analysis of the connection between act and result is relevant. *See* HART, *supra* note 97, at 308-24. In evaluating consideration we are concerned not with breach but with establishing in the first instance a connection between the parties' acts of commitment and bargain as the result of such acts and the product of their reciprocal commitment. This presentation re-

agents who are centers of causal power. To consider the commitment of either as being caused by the other would suggest human action that was not voluntary.[147]

i. Inducement and Bargain

Human action can be characterized as intentional because of the changes we make in the world—it is on this basis that we make a distinction between what happens to us and what we do. It is in acting to realize our intentions by causing the world to be other than it would have been that we develop a sense of our autonomy as persons.[148] By the same token, when we act together with others, we become co-authors of what we bring about. Thus in bargain, the promisor acts together with the promisee. She proposes that they make the bargain their common product. She wants the co-authorship of the other. And because intentional human behavior is caused by beliefs and reasons, she must appeal to the other's capacity to act on such mental predicates for action as a separate and distinct person. She must appeal to the other as one whose reasons and beliefs are causally efficacious in the world, as one whose reasons and beliefs can make a difference to the states of affairs that will exist.

The same is reciprocally true of the promisee. If reasons are causes and we recognize the causal power of another person in action (and we are never not in a stream of activity) then one person cannot motivate another person's actions except through the mediation of that other's systems of desires and beliefs. Dependence on this mediation in all interpersonal transactions accounts for the dependence of bargain on inducement rather than causation. One person can cause another to break a vase by pushing him into it. She cannot provoke him to hand the vase to her without the intervention of the other's beliefs and purposes. What it means for one person to induce another is precisely to make an appeal to

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quires an analysis of inducement for the reason given in the text above. *See id.* ("Interpersonal Transactions: Reasons and Causes"). By securing a reciprocal commitment to relinquish autonomy, bargain establishes the legal framework within which a party's acts or omissions may cause breach and compensable damage.

147 *See* H.L.A. Hart & Tony Honore, *Causation in the Law,* LXXII L.Q. REV. 58, 80 (1956):

> When we do speak of a human action as caused, this is with the strong implication that the agent acted in one or more of those many different circumstances which are treated as inconsistent with his action being fully voluntary: we imply if we speak of an action as 'caused' that the agent acted under coercion, or domination or that he had lost self control or was submitted to some special stress or emergency, or was mistaken or misled, or forced to act in some way even though the compulsion was only a moral one.

148 *See supra* text accompanying note 120.

the reasons of the other so that the other will, acting on those reasons, be caused to act in the way intended by the first person.[149] Thus, before a bargain may be attributed to either party, the commitment of each must be found to induce the commitment of the other to enter exchange. Such acts of reciprocal inducement connect the bargain to the conduct of the parties. For this reason they serve as a basis of imputation in law.

We have also seen that the distinction between the social form of bargain and the social form of exchange mirrors the distinction between commitment and performance. What either exchangist desires to obtain is performance in actual fact. But each accomplishes this purpose by means of inducement; each induces the other to commit to exchange. In this respect, Adam Smith's definition of bargain given above is imprecise insofar as it does not explicitly present the appeal each must make to the other's reasons for action. Each must give, and intend to give, the other a reason to deliver the performance she or he seeks and the other must act at least in part because of such reason. Bargain is precisely the social form within which this appeal to another's reasons for action takes place. As such, it must be understood to be different from and irreducible to exchange in exactly the way meaning is irreducible to behavior.[150] Commitment is different from performance and bargain involves not an exchange of performances, but an exchange of commitments. Even where bargain takes the form of a promise exchanged for acts of performance this is true: from the perspective of bargain what counts is not perform-

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[149] HART & HONORE, *supra* note 100, at 53, suggested four features common to interpersonal transactions. Because they apply to other types of interpersonal transactions as well, these are not features that define a bargain as such. But because bargain represents a subset of this larger universe of transactions the points made are all true of the inducement that characterizes bargains:

> (i) in all of them the second actor knows of and understands the significance of what the first actor has said or done; (ii) the first actor's words or deeds are at least part of the second actor's reasons for acting; (iii) the second actor forms the intention to do the act in question only after the first actor's intervention; [and] (iv) except in the case where the first actor has merely advised the second act, he intends the second actor to do the act in question.

Id.

First, for an enforceable bargain the promisee must know and understand the significance of what the promisor has said or done. Second, the promisee must make the promisor's commitment to the exchange at least part of his reasons for acting. Third, the promisee must form the intention to manifest a commitment to exchange only after the promisor's intervention. Fourth, the promisor must intend the promisee to commit himself to exchange.

[150] Just as we read nature for meaning, so too behavior carries meaning that we interpret. A person waves her hand or slams a door. But meaning is not reducible to behavior: to know that a person has waved or slammed a door is not necessarily to know why it was done. *See infra* notes 173-76 and accompanying text.

ance, but the commitment the performance expresses. Performance functions not only as a means to change existing states of the world, but also as a bearer of meaning.

In the analysis of consideration, an appreciation of the difference between bargain and exchange has been obscured by reifying consideration as "something given in exchange." Rather than understanding the return of the promisee as a manifestation of commitment to relinquish autonomy, consideration has been treated as a material thing: "Have you given consideration?" "Yes, she picked up the vehicle [or shares, or money, etc.] this morning." Alternatively, the material fact of performance is treated as consideration, obscuring the distinction between behavior and its communicative significance. Thus, in Illustration one to RESTATEMENT SECOND OF CONTRACTS § 71, *A* offers to buy *B's* book for $10; *B* accepts and gives the book to *A*. The Illustration concludes: "The transfer and delivery of the book constitute performance and are consideration for *A's* promise."[151]

But the significance of consideration is not in the act as a behavior but in the meaning of the promisee's act. The promisor has acted in a way that overtly manifests commitment to exchange by her proposal. She wants a bargain in order to accomplish an exchange of performances. In giving consideration, the promisee offers an overt promise or performance that by relinquishing or pledging to relinquish autonomy expresses a reciprocal commitment. It is this reciprocal commitment which occurs at the threshold of exchange, not in exchange, that constitutes consideration. Thus, in Illustration One, the transfer and delivery of the book constitute an overt manifestation by action of a commitment to relinquish autonomy. The commitment relinquishing autonomy is expressed by performance. But the act as performance and the act as commitment are referable to different social forms. The act as performance is part of the material process of exchange; the act as commitment gives existence to the social form of bargain.

Llewellyn observed the confusion surrounding the classical presentation of consideration as a thing, a bargained-for equivalent, and appreciated that a concept of commitment rather than actual performance was required to justify enforceability.[152] But his philosophical commitment to the empiricist methodologies of legal realism[153] prevented him from rec-

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[151] RESTATEMENT (SECOND), *supra* note 70, § 71, illus. 1.

[152] *See* Llewellyn, *supra* note 70, at 803, 805.

[153] *See, e.g.*, Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861, 881 (1981) (emphasizing the empiricist orientation of American Legal Realism).

ognizing the meaning filled reality of bargain or, as a consequence, adequately presenting its social function. Llewellyn tended to see actual things and behaviors as the only reality,[154] and he considered words of promise significant only because they were ultimately reducible to the things to which they referred. As a consequence, instead of using the advance his analysis represented to reform our understanding the doctrine of consideration, he transported the classic problems plaguing that doctrine to his analysis of assent.

A starting point for his analysis was the problem presented by an offer for a performance that takes time.[155] He thought to solve the incoherence of traditional doctrine by rejecting the "Great Dichotomy" between bilateral and unilateral contracts—the dichotomy between a promise given for a promise on the one hand and a promise given for an act on the other.[156] For the *First Restatement*, consideration had to be either a promise or a performance.[157] But where a performance rather than a promise is requested, and where it takes time, there was nothing to correspond to consideration's perceived technical definition until performance was fully completed. Only this, "the ultimate juice of real performance

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[154] Four years before, Llewellyn wrote *Our Case Law of Offer and Acceptance.* Hermann Kantorowicz, *Some Rationalism About Realism*, 43 YALE L.J. 1240, 1249 (1934), observed, citing Llewellyn specifically, that legal realists could not distinguish between things and their meaning: "the legal realists fail to distinguish between *realities* and their *meaning*. Llewellyn wishes to restrict legal science to 'observable' and even 'tangible' facts. Now the essential relations in law are never observable. . . ." *Id.; cf.* SRHE, *supra* note 5, at 133:

> Because social structures are necessarily unperceivable ('present only in their effects'), empirical confirmation will always be indirect, i.e., via the detection of the effects of structures. At the same time the recognition that the identification of social practices (activities and acts) depends upon the mediation of meanings requires an extended notion of the empirical.

But Kantorowicz's position is at least as far from critical realism as it was from the legal realists whose "radical" views he thought so unseemly; because of its normative character, law for him could not be the subject of causal explanation. *See* Kantorowicz, *supra* at 1248.

[155] *See* RESTATEMENT (SECOND), *supra* note 70, § 45 (providing that where a promise is exchanged for a performance, and where the performance takes time, then in the usual case the promisor is bound when the promisee begins performance). According to the *Restatement,* an option contract is created (in this instance, a contract that binds the promisor to her offer for the time required for the promisee to complete performance). The promisor's duty to perform, however, is conditioned on the promisee's completion of the performance.

[156] *See* Llewellyn, *supra* note 70, at 787. A bilateral contract is established by the exchange of a promise for a promise; a unilateral contract, by the exchange of a promise for a performance. In the first instance, both persons promise; in the second, only one person promises.

[157] *See* RESTATEMENT (FIRST), *supra* note 70, § 75.

bargained for,"[158] was the bargained-for equivalent. As a consequence, if the logic of definition is to guide decision, then we are committed to the view that until there has been full performance, the offeror can revoke, and so the Langdellian tradition held.[159]

But the result was patently unsatisfactory, as indeed was the American Law Institute's solution. Both *Restatements* rejected the formalist response by treating the offeror as bound upon the promisee's commencement of performance, but they did so by imposing the fiction of a subsidiary offer.[160] According to the account given in the *Second Restatement*, the promisor's main promise carries implicitly a subsidiary promise to the promisee that if he begins she will make her offer irrevocable. Now consideration is found twice: first, there is the commencement of performance that establishes consideration for the option contract; second, there is full performance that establishes consideration for the main contract. Doctrine is saved Ptolemaically through the addition of epicycles of performance.

Llewellyn thought this approach, and the tradition to which it responded, nonsense; both foundered on the "Great Dichotomy." What mattered was not whether performance or promise counted as consideration, but whether an overt expression of agreement manifested commitment to a bargain. If, he argued, manifested agreement could be found, then the deal was on and the offeror could no longer revoke.[161] Thus, the commencement of performance should count as an overt manifestation of agreement[162] and consideration doctrine, if it was to make sense at all, should learn to follow assent.[163]

Isolating an overt expression of commitment as the point of enforceability of the promisor's promise was a decisive step. Nonetheless, the progress of Llewellyn's analysis was compromised because promises, the main bearers of reciprocal commitment, were for him just words:

> In the bilateral situation the first and outstanding fact of life is that outside of lunatic asylums real people do not in good faith offer 'a

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[158] Llewellyn, *supra* note 70, at 791.

[159] *See* C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS (2d ed. 1880), § 70, at 88; Maurice Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136, 137 (1916). Notice that as long as a promisor can revoke her promise, the promise is not enforceable. As a consequence, the problem presented is the problem traditionally engaged by consideration analysis—distinguishing between an enforceable and unenforceable promise.

[160] The *First Restatement* did so by comment, RESTATEMENT (FIRST), *supra* note 70, cmt. b (1932), and the *Second Restatement* made the offer of an option contract part of its text. *See* RESTATEMENT (SECOND), *supra* note 70, § 45.

[161] *See* Llewellyn, *supra* note 70, at 803.

[162] *See id.* at 812.

[163] *See id.* at 787.

> promise for a promise'. . . what the business men do is to offer . . . .not words, but other things, by means of saying words.[164]

People do use words to refer to things, but Llewellyn here belittles the significance of an exchange of promises. Our ability to obtain things from others through exchange is mediated necessarily by the social institutions and structures of communication. The possibility of inducement, itself implicit in our respect for another's autonomy, depends on such structures and we do indeed bargain for promises. It is not a question either of intending to obtain an exchange of promises or intending to obtain an exchange of performances. A promisor seeks a commitment in order to obtain a performance. But an exchange of promises for Llewellyn approximates play acting because only perceivables—things, behaviors—and not meanings are real. In consequence he misses the significance of bargain as a meaning-filled social form.

Llewellyn thought he could make manifested agreement escape the perceived insubstantiality of promise because, once overtly manifested, any agreement was pregnant with actual reliance, even if nothing could be offered to show the actual fact of reliance. He argued this was possible because when business people make deals, the future is collapsed to the present:

> The American business man draws no sharp distinction in his deals between the promised and the accomplished. Our market does work, in its legally more important parts on credit and future arrangement; but it works so strongly and so surely in those terms that future arrangement tends to merge into the present. My 'net worth,' which is a concept of the present, is, for substantial purposes, the difference between two future concepts: what is owed me less what I owe. . . . Agreeing for the future is so normal and so thoroughly relied on as to individual deals it takes on to the layman in his ordinary thinking indifferently and without discrimination the guise of an accomplished something or the guise of a something merely initiated, or both together. . . . Each of these last concepts [sales made, checks as payment, cash in the bank, etc.] is an instance of futurity observed and flatly felt as present; the future phrasing and the present phrasing about a deal are commonly synonymous. Either expresses both. Once the agreement is concluded, once the deal is closed, the outfit which will need supplies or service is "covered," it can put on a sales force to "sell" what has been "bought," cease buying itself along the line in question, go into the market for complementary inventory or materials for manufacture. If there develops a delay in delivery, the

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[164] *Id.* at 789.

> chances are even that information to that effect will run in about 'your goods' rather than about 'your order'. . . .[165]

The significance of this, he continues, is that if the future is felt as present, then and from the moment there is overt agreement "it is to be expected that the participants in the deal will rely soon, and will rely hard, and will rely in intangible ways absurdly difficult to prove, upon the deal so closed."[166]

Now this is an unusual argument to use to explain the point at which an offer becomes irrevocable. Collapsing the future to the present works as long as everything runs smoothly. But let the normal run of events be disrupted, let there be a failure of supply, or misjudgment, or some other factor compromising the ability of one or another party to perform, and there is no more talk of future phrasing and present phrasing of the deal as synonymous. What everyone wants is performance now, and it seems a curious theoretical argument to explain the grounds of enforceability on the basis of premises that presuppose everything runs without a hitch. If everything ran without a hitch, there would be no need for a theory of enforceability at all. The logic, in other words, resurrects a familiar circle: "that future arrangement tends to merge into the present" is the very work of promise, but this depends on enforceability.

Also, it seems curious to argue that once there has been agreement the presence of reliance will justify enforcement, for this too is circular in a familiar way. In fact, an offeree may not wait for an "overt expression of agreement" to rely, but do so as soon as an offer is received, or even upon hearing from the promisor that an offer will be forthcoming.[167] The question is not when, as a factual matter, a party relies, but when a party is *entitled* to rely.[168] This is a matter of attribution that cannot be solved by invoking merely the fact of reliance.

Llewellyn saw only the empirical as real and thus turned to reliance because it was actual behavior; manifested agreement could be taken to identify the point of irrevocability because it embodied such behavior. Recognizing, however, that circumstances surrounding an agreement often did not show reliance, he nonetheless felt we could assume its presence: the parties "will rely soon, and will rely hard, and will rely in intangible ways absurdly difficult to prove upon the deal so closed."[169]

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[165] *Id.* at 802-03.

[166] *Id.* at 803.

[167] *See* Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 274 (Wis. 1965) (holding that Red Owl's assurance of a franchise was enforceable because of extensive reliance induced though in fact no offer was ever made).

[168] *See* Barnett, *supra* note 80, at 274-76; *infra* note 207.

[169] Llewellyn, *supra* note 70, at 803.

Agreement becomes the measure of enforceability because (to borrow a phrase) it is "instinct" with actual behavior.[170]

Yet "manifested agreement"—or bargain[171]—is a social form in its own right because of its meaning, not because it is a surrogate for the physical behaviors to which the agreement refers. Its reality is not behavior, but reciprocal commitment expressing the intent to embrace exchange. Enforceability becomes possible because manifested agreement expresses an exchange of commitments, each inducing the other, justifying attribution of it to the parties who have so committed themselves.

Bargain is a social form that transforms expectations and in so doing lays the foundation for the enforceability of promises. It is a social form that cannot be reduced to the performances to which it refers. It is different from exchange. Because it is a social form for the exchange of commitment, it facilitates exchange for the reasons that promising facilitates exchange. Reducing an exchange of promises to the things to which they refer is a form of reducing social structure to individual behaviors. But social structures of meaning cannot be so reduced.[172] We may know someone is polishing an icon and not know why they are doing it.[173] A major significance of Hart's, THE CONCEPT OF LAW, was to underscore the indispensability to legal analysis of the distinctions forced by the hermeneutical tradition.[174] Thus, his distinction between the internal and

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[170] *See* Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 214 (N.Y. 1917) ("[I]nstinct with obligation.").

[171] 'Agreement' alone is generally used in a broader sense than 'bargain' to include assent without need for a reciprocally manifested commitment to action—"we're agreed then, if you ever do need widgets, I'm the one who has them." But that is not Llewellyn's meaning here.

[172] Not only can meaning not be reduced to behavior, it cannot be reduced to the intention with which an act is performed. *See* PON, *supra* note 5, at 85:

> the meaning of an action such as 'chopping wood' or 'saying hullo,' that is, its correct identification as an act of a particular type in a particular language and culture, is always and in principle independent of the intention with which it is on some particular occasion, by some particular agent, performed;

see also SRHE, *supra* note 5, at 165:

> the meaning of an act (or utterance) must be distinguished from the agent's intention in performing it. . . . the reason why the agent performs the act is a fact about the person which cannot be read off or deduced from its social meaning. The question 'why is X exchanging rings with Y?' is not exclusively or exhaustively answered by reference to the fact that this is part of the ceremony (act) of getting married.

[173] *See* SRHE, *supra* note 5, at 164.

[174] In particular, Hart acknowledged the contribution of PETER WINCH, THE IDEA OF A SOCIAL SCIENCE (1958). *See* H.L.A. HART, THE CONCEPT OF LAW 289 (2d ed. 1994). P.M.S. Hacker noticed the importance of hermeneutics to Hart's analytical jurisprudence in P.M.S. Hacker, *Hart's Philosophy of Law*, *in* P.M.S. HACKER & J. RAZ, LAW, MORALITY AND SOCIETY 1, 9 (1977); *and* NEIL MACCORMICK, H.L.A. HART 32 (1981).

external mode of following a rule depends on the irreducibility of meaning to behavior.[175] We may see a man, together with others, remove his hat on entering a church without knowing why he does so or whether he even knows what kind of building a church is. Exchange is a form for the exchange of performances; bargain, for communication of meaning through words and action.

Reducing the future to the present, commitment to performance, and agreement to reliance, Llewellyn loses the significance of consideration as a social form establishing the attribution of bargain to the parties who have made it, thereby justifying the exercise of public coercion. How, instead, may that exercise be explained? First, given social relations of interdependent autonomy, exchange functions to accomplish the distribution of goods and services. Second, bargain facilitates exchange. Third, where parties have co-authored a bargain it may be attributed to them. The justification for enforcement—and the basis for identifying the point of irrevocability of an offer—is not reliance, but co-authorship of a social form, a specific social accomplishment, which facilitates exchange. Exchange is a social form that must be assured if autonomy and the social division of labor are to be reproduced. Bargain is a social form of expectation and meaning that commits the parties to it to exchange. Bargains are attributable to individuals when they have co-authored them. When there has been a reciprocal expression of commitment by promise or performance, intent to exchange and reciprocal inducement, bargains may be enforced.

ii. From Commitment to Obligation

A species of alchemy occurs in the social form of bargain. Recall that interdependent autonomy is a contradictory form: while the autonomy that characterizes it reflects an individual's formal independence, in fact each person is dependent on social connection. The production of each is specialized as a consequence of the social division of labor, but needs are general. To serve his or her private interest, each is driven necessarily to exchange. But because exchange represents a coincidence of private interests and because this coincidence of interest may dissolve, private arrangement must become social obligation if social reproduction is to be assured. Personal commitment must be transformed into enforceable duty.

Consideration is the legal form to work this transformation. Both parties to a bargain must demonstrate: (1) a volitional commitment to

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[175] *See* HART, *supra* note 174, at 55-57, 88-91. The external point of view merely records regularities of behavior; those who adopt an internal point of view towards a rule treat it as a reason for their conduct.

relinquish autonomy; (2) actuated by an intent to exchange; and (3) inducing the other to commit. The promisor does this by her proposal to the promisee. Where the promisee gives a return commitment characterized by these elements, his return establishes consideration and turns the personal commitment of both into legal obligation.

Consideration is constituted first by a manifested willingness to enter exchange. This may be expressed either by promise or performance. If it takes the latter form, the performance is interesting to us not as behavior with material consequences, but for the meaning it carries—the action taken reflects a commitment to embrace exchange because the performance, itself necessarily a surrender of autonomy, cannot be withdrawn. In either case, whether in offering a promise or performance, the promisee must manifest commitment in order to show that the loss of immunity from social interference consequent on entering exchange truly reflects a rudimentary minimum of volition. In this way, manifested commitment establishes autonomy.

Second, the act of commitment required for consideration must be actuated by an intent to exchange. However manifested, the intent to exchange that animates the act or pledge of commitment must show not only an exercise of autonomy, but also an exercise of autonomy specific to the social division of labor: I have something useless to me (relatively) that I am willing to surrender in order to obtain the thing you have that I need. The promisor wants an umbrella from me and I will surrender one in order to obtain money. There need be no intention to be legally bound; the intention presented need have nothing to do with law. Only an intention to enter an interpersonal relation need be present. While the requirement of commitment establishes a willingness to forego the formal character of social isolation presupposed, the intent to exchange reflects an intent to obtain the performance of the promisor by providing her with the performance she seeks.

Third, that each must induce the other requires as well that each recognize the other as one whose cooperation is necessary in order to transform the world through exchange. Each must recognize the other as a center of causal power and appeal to her or his reasons for action. The autonomy of each must be recognized by the other and in so doing the autonomy of each is reconstituted by the other. Each in bargain must relinquish autonomy, but each does so in a context that results in the reconstitution of his or her autonomy.

There is a mirror difference, however, between the inducements of the promisor and the promisee. On the one hand the promisor, with the prospect of the promisee's embrace of exchange in mind, makes what is,

analytically,[176] an original proposal. This is a conditional proposal designed to induce the promisee's commitment and the promisor is not obligated to perform just because she has made it.[177] The promisor proposes to deliver a performance to the promisee, but her proposal is conditioned on the promisee providing the promisor with the inducement she seeks in return. In this, she must actually succeed. That is, for there to be a bargain, the promisor's proposal must actually induce a return commitment from the promisee.[178] The promisee must actually provide the promisor with the inducement she seeks.

By contrast the promisee's commitment is, analytically, action taken in response to the inducement of the promisor. In response to the proposal of the promisor, the promisee gives her the inducement she sought. This commitment is itself designed to motivate the commitment of the

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[176] The specification is necessary because an analytical presentation of the matter may be distinct from a chronological narrative describing how a particular sequence of negotiations took place. Who is identified as the promisor and who as the promisee depends not on who initiated communications, but on the promise one is trying to enforce: the promisor is the party who made the promise that is to be enforced.

[177] *See* Farnsworth, *supra* note 117, § 2.9, at 63:

> When bargaining, the means he uses in attempting to induce an exchange is to condition the commitment or performance, threatening to withhold it unless he gets the return commitment or performance sought. When a seller of apples says, 'I promise to deliver these apples if you will promise to pay me $100,' what the seller means is, '*If* you *do* make a commitment to pay me $100, you shall have my commitment to deliver these apples; *if* you *do not* make such a commitment, you shall have nothing.'

Peter Meijes Tiersma, *Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise*, 26 U.C. DAVIS L. REV. 1, 18-19, (1992) makes the same point, but distinguishes the conditional commitment of an offer from a promise. He argues a promise cannot be conditional, but instead binds as soon as it is made. *See id.* at 23. Thus, although he concludes that consideration should arise with commitment, he does not mean to equate consideration with commitment. *See id.* at 39. Instead, he means that consideration, as the content of a promise, identifies which promises the law will enforce—consideration, he argues, should extend to "promises that *propose* or *contemplate* an economically-motivated exchange," (a social proposal to go hiking will not be enforced, but a proposal to pay a six percent commission for an exclusive real estate listing will be). *See id.* Therefore, if this substantive element is present, consideration should "arise when parties *commit* themselves to such an exchange." *See id.* That is, consideration specifies the content of enforceable promises, but the promisor's act of promising does the work of binding her to the contract. By contrast, I argue that consideration is constituted by a promise or performance committing the promisee to relinquish autonomy and, in consequence, to the embrace of exchange. I argue that such commitment *is* consideration and renders the promise of the promisor binding because with the promisee's commitment by word or act the parties' bargain may be attributed to them jointly. They are co-authors of it.

[178] Cross offers, for example, are not enforced because although both parties share an intent to exchange, the promisor's inducement is not efficacious. The promisee commits to an exchange but not because of the promisor's proposal. *See* FARNSWORTH, *supra* note 117, § 2.10, at 66.

promisor by rendering it unconditional. The promisee induces the promisor's unqualified commitment by satisfying the condition to it. This completes the bargain. The promisor has given a commitment expressing an intent to exchange and inducing the commitment of the promisee; in response the promisee has given the commitment requested. The bargain may be attributed to both parties, and on this basis the promise of the promisor may be enforced. A conditional commitment has been transformed into a binding obligation.

Consideration, then, the thing that triggers the enforceability of a bargain promise, is an induced commitment manifested as an inducement to commitment. As a commitment to exchange it commits the promisee to relinquish autonomy in fact and in so doing forms a bargain. Once consideration has been given, both the promisor and promisee are subject to the legal relationship that they have conjointly created.[179]

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[179] The foregoing analysis allows a presentation of bargain focused on those features particular to it. Bargain differs from exchange in that it is a social form of commitments that have been reciprocally induced. For commitment to be induced means that each party must appeal to the beliefs and reasons of the other. The first party offers the second reasons for action. The second acts at least in part on the basis of them by making them his own and making them the cause of his actions. To reflect these features Adam Smith's characterization— "give me that which I want and you shall have this which you want"— may be reworked along the following lines: I intend to give you a reason to commit to give me that which I want. The reason I give you is my promise: if you give me a reason to commit to give you what you want I will so commit. The reason I want you to give me is this: that you commit to give me that which I want.

Needless to say this is not so felicitous as Adam Smith's account, but it invites a more careful presentation of inducement.

> Promisor: I intend to give you a reason to commit to give me that which I want.
>
> *The promisor's reason causes her to act.* The prospect of the promisee's performance has become the promisor's reason for acting. Therefore, she seeks to induce a commitment from the promisee to deliver that which she wants. She does this by her promise and in so doing manifests a volitional decision to embrace exchange.
>
> Promisor: The reason I give you is my promise: if you give me a reason to commit to give you what you want I will so commit.
>
> *The promisor induces the promisee.* The promisor's commitment is actuated by a particular state of mind; she commits with an intent to induce in order to obtain. Her proposal offers the promisee a reason for acting. In so doing, she transforms social structures of meaning and expectation. If the promisee wants the promisor's commitment, he must also embrace exchange and make the desire for the promisor's commitment a reason for his reciprocal action. His reason for acting must cause his commitment. The form of the promisor's proposal is therefore conditional: I have promised but my promise is conditioned on your commitment being given

Escaping from an argument's circle is often slippery business, but I find no *petitio principii* in this analysis. A circular argument consists in assuming the thing one wants to establish. To claim that consideration renders promises enforceable and then to assert in addition that a promise can constitute consideration because it is enforced is circular reasoning. But on the analysis given, a promise is enforceable when the promise given in return for it gathers those factors of volition, particularized intent and inducement that permit its attribution to the promisee.

Yet even a specification of factors rendering promises enforceable can beg the question if the identification simply pushes the paradox back one step—a promise will be enforced when the factors deemed necessary for enforcement are present. If these factors remain unexplained, analysis is not advanced.[180] But the factors presented in the foregoing analysis

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> in return. Thus, the promisor's promise will not be enforced unless her inducement succeeds. Because of it, the promisee must manifest a commitment to exchange.
>
> Promisor: The reason I want you to give me is this: that you commit to give me that which I want.
>
> *The promisee must induce the promisor.* The promisee's embrace of exchange must also be actuated by the requisite state of mind: the promisee must intend to induce the promisor by giving her a commitment to the performance she seeks. In this the promisee manifests an intent to induce in order to obtain.
>
> If the promisee's committed intent is responsive to the promisor's commitment, then the promisor has the reason that conditioned her own commitment. The promisee has given an induced inducement in response to the promisor's commitment to commit. Because the promisee's inducement is the very thing sought by the promisor, the exchange of commitments is complete and may therefore be attributed to both parties. They are joint authors of the bargain. At this point if the promisor does not perform in a timely manner her promise can be enforced.

A composite form of bargain reflecting the types of bargain introduced immediately below, *see infra*, Part IV.B.3.d.iii—the bargain for a future exchange ("promise to give me"), the bargain for a half-completed exchange ("give me"), and the bargain for an attempted exchange ("try to give me")—may be presented as follows:

> I intend to give you a reason to [promise to give me/give me/try to give me] that which I want. The reason I give is my promise: if you give me a reason to commit to give you what you want I will so commit. The reason I want is this: that you [promise to give me/give me/try to give me] that which I want.

Whether the promisee promises, gives, or tries to give, in each case the promise, performance or commencement of performance functions as a bearer of meaning. In each case the promisee is induced to provide the commitment requested and in so doing provides the inducement necessary to bind the promisor to the bargain.

[180] Recall Professor Corbin's defense of question-begging, *supra* note 36, § 109, at

are not ad hoc. They have their source in the underlying social relationship—the relationship of interdependent autonomy—responsible for the parties' resort to exchange and for society's resort to law to secure exchange.

Moreover, not only can these factors be derived from the relationship of interdependent autonomy, they function also to reproduce it. The first factor, the promise or performance required to manifest a commitment to relinquish autonomy and embrace exchange, establishes the minimum standard of volition necessary to show an exercise of autonomy. The second factor, an intent to exchange, establishes an exercise of autonomy determined specifically by the social division of labor—each has a product or service to give and is willing to surrender it to obtain what it is he or she just now lacks. The third factor, a requirement of inducement, establishes that the autonomy foregone in embracing private exchange is reconstituted in the very transaction wherein it is surrendered insofar as it is recognized and given efficacy by another. Just as goods or services are surrendered to receive others in return, autonomy is surrendered to be constituted in return.

In sum, elements already present in the *Second Restatement's* presentation of the consideration doctrine can be shown to rest on, and reproduce, the underlying social mechanism responsible for generating them. Rather than refashioning a circle of paradoxical logic, retroductive analysis shows consideration to be an intrinsic part of a cycle of social reproduction.

iii. The Types of Bargains

On the basis of the foregoing analysis we may characterize the forms of bargain. We know that consideration given may consist of a promise, a completed performance, or the commencement of performance. In working through the way in which each may be understood to induce the performance of the promisor, each must be correlated with the bargain to which it corresponds. Each such bargain facilitates exchange, but does so differently. The types of bargains to which these different forms of consideration respond are as follows:

487-90:

> Therefore, when the statement is made that no informal promise is enforceable if it is without consideration, it must be understood as a statement that no informal promise is enforceable unless it is accompanied by one of those factors that have been held, more or less generally, to be sufficient to make a promise enforceable. As thus understood, is the statement much better than to say that an informal promise is legally enforceable when the facts are such as to make it legally enforceable?

A bargain for future exchange: The most common form of bargain is the exchange of mutual promises. This reflects a manifested commitment on the part of both parties, by promise, to future exchange. For convenience, this may be called a bargain for future exchange. Each party manifests reciprocally a commitment to future exchange by promising performance.

A bargain for a half-completed exchange: If a promise is given for an act, the promisor may specifically negate commitment for anything less than complete performance. In this case, following Fuller, the transaction may be called a bargain for a half-completed exchange.[181] Both parties manifest a commitment to a half-completed exchange—the promisor by promising, the promisee by delivering the completed performance. The performance expresses the double meaning required for bargain: a willingness to relinquish autonomy manifested as a commitment to exchange. A broker's contract that provides for an open listing is typically of this form.

A bargain for an attempted exchange: A promise may also be given for an act in a context in which the promisor offers the promisee a chance: go ahead and give it a go; if you succeed I promise to pay. Here the promisee's commencement of performance commits the promisee[182] and as a consequence binds the promisor to give the promisee the chance to succeed. The transaction may be called a bargain for an attempted exchange. Both parties manifest a commitment to an attempted exchange—the promisor by promising, the promisee by beginning performance. *Hamer v. Sidway*[183] is a classic example.

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[181] *See* Fuller, *supra* note 70, at 815. Llewellyn would call this a bargain for a "speculative prize," *see* Llewellyn, *supra* note 70, at 806, but this does not capture the types of bargain that can arise under the category, as his own lively example makes clear: "Promises? I am sick of promises. The only thing that interests me is cash. Fifty-six hundred on the line by Tuesday noon, or it's off. Put up or shut up." *Id.* at 815. Here the commitment required as an inducement is cash. Cash will give the promisor reason to act and the promisor has committed to act if so induced.

[182] But that does not bind him! It is the nature of an attempt that the promisee should incur no liability for failing to complete performance. A promise to pay $1000 if another will sit on a flagpole for 10 days gives that person a chance to earn $1000 but does not bind him to anything. It is essential to distinguish here between the bargain being attributable to the promisee because of the relinquishment of autonomy involved in commencing performance and the promisee incurring obligation under the bargain. Because the bargain may be fairly attributed to the promisee, the promisee could reasonably be subject to obligation. But that the promisee be subject to obligation upon beginning performance is not the nature of the bargain the parties have made. Their intent is precisely that the promisee should have an opportunity to perform without incurring liability for failure to perform.

[183] 27 N.E. 256 (N.Y. 1891) (finding an uncle's promise to pay $5000 if his nephew would not smoke, drink, gamble, or swear until his 21st birthday to be supported by consideration). The type of bargain the parties have formed depends on their intent and

Notice that this presentation of the problem of attempted exchange dissolves the fictions of RESTATEMENT § 45 and the embarrassment of the Brooklyn Bridge hypothetical. In that famous problem, a promisor offers another $100 to cross the Brooklyn Bridge, but when the promisee is halfway across the promisor overtakes him and revokes her offer.[184] Plainly, beginning performance is a relinquishment of autonomy in fact and manifests a commitment to exchange; thus under the analysis given above, this constitutes consideration. Accordingly, the promisor is bound upon the promisee's commencement of performance. Necessarily, however, the promisor's duty of performance does not arise until the condition precedent of the promisee's successful performance has occurred, but this is no different from other instances of promises made conditional on the occurrence of particular events, such as an ordinary homeowner's fire insurance contract. Moreover, this analysis does not entail that the promisee *accept* on beginning performance. Upon acceptance, the promisee would be bound and it is in the nature of an attempt that the promisee should be able to abandon the effort if he chooses. Commencement of performance, therefore, does not bind the promisee. The promisee's acceptance occurs on the delivery of full performance.[185] It is at this point that his liability for defective performance could be established.[186]

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the meaning of their intent is a matter of interpretation. Normally, one would expect a presumption that an offer of a promise for an act should be interpreted as a bargain for an attempted exchange rather than for a half-completed exchange because attempts will be encouraged if ambiguous language is understood to commit to an attempted exchange. This facilitates exchange because many attempts will result in successful exchanges. Conversely, presuming a half-completed exchange will discourage many attempts. Moreover, an interpretative presumption to this effect throws the burden on the promisor to specifically negate any ambiguity by making clear the limits to her commitment, thereby inviting negotiations and avoiding surprise. As a consequence, the potential for loss of uncompensated time and effort by misplaced reliance in an attempt to perform is reduced.

[184] *See* Wormser, *supra* note 159, at 136-37.

[185] Because he holds that a promise cannot be conditional but is binding when made and because he fails to distinguish between the attribution of a bargain and its obligation, *see supra* note 177, Professor Tiersma, *supra* note 175, at 25, 27, argues that a unilateral contract does not require acceptance and that the offeree of a unilateral contract is never bound. But I argue above that the offer for a unilateral contract becomes irrevocable when there has been a reciprocal commitment to relinquish autonomy by both the promisor and the promisee such that the bargain can be attributed jointly to them and that the offeree of a unilateral contract is bound upon performance and responsible for defects in that performance. In the case of a bargain for an attempted exchange, attribution is distinct from acceptance. The promisor is bound upon the promisee's volitional decision to enter exchange because the contract may then be jointly attributed to both the promisor and the promisee, but it is part of the meaning of this type of bargain that the promisee shall not be bound except upon delivering a completed performance.

[186] Defect in the promisee's performance has in fact been missing from discussions of

iv. Constituting Autonomy

Recall that interrogating the causal efficacy of either party's reasons for constraining him or herself tests for a genuine exercise of autonomy. A manifested intent to exchange ensures that the parties by their conduct have given existence in conduct each to their own autonomy. Comparably, making explicit the dependence of bargain on inducement tests for the social recognition of autonomy. Not only is the autonomy of each party to a bargain given expression by action in accordance with his or her intent, but also the autonomy of each is socially constituted by the other's recognition of it. Unable to take from others the objects she wants without their consent, the promisor confronting exchange induces others to surrender to her goods belonging to them. To do so, she appeals to their own capacity for intentional agency. She offers them reasons for action. If a promisee makes these reasons his own, they cause his action. The promisor gets what she wants by relying on the promisee's capacity for intentional and self-determined activity and, reciprocally, the same is true of the promisee. Both constitute the autonomy of the other by accepting it as given and making an appeal to it.

There is another point of significance. Bhaskar noticed that "the utilitarian must conceive others or society as manipulable objects."[187] We induce others to serve our ends by making them means to obtain the goods and services we need through exchange; that is, we treat others as means to our ends rather than as ends in themselves. What the analysis of bargain's requirement of inducement shows is that the tendency to

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RESTATEMENT (SECOND) § 45. Suppose the promisor makes an offer of a promise for a performance and the promisee delivers a performance. How do we know whether the promisee has breached? The Uniform Commercial Code § 2-206(1)(b)(1977) is understood to provide that a person who responds to an order by shipping non-conforming goods without so stating at once accepts and breaches. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-5, at 27 (4th ed. 1995) ("Of course, the seller breaches if it ships nonconforming goods, unless the shipment of non-conforming goods is an accommodation to the offeror as allowed under 2-206 (1)(b)."). But breaches what? In a unilateral contract the promisee has delivered a performance. What is there to breach? To ask these questions seems peculiar, but this is only because we assume that the promisee's performance is the bearer of meaning against which breach can be measured. Otherwise we have no way of speaking of a defect of performance or of a non-conforming performance. The promisor cannot impose unilaterally a yardstick of performance on the promisee. This is something the promisee must furnish on his own. The promisee's performance in a unilateral contract forms a bargain by communicating a commitment to enter exchange. Delivering full performance communicates acceptance of the promisor's offer. Just as with a promise followed by a defective performance in breach of that promise, so too for a unilateral contract a defective performance may be in breach of the commitment offered in acceptance of the promisor's offer, but in this instance the commitment is expressed by action and may be breached by the action that expresses it.

[187] SRHE, *supra* note 5, at 288 n.41.

manipulate others[188] is secreted here in our everyday behaviors in exchange. This is a consequence of the way the social relations of exchange presupposed by bargain condition our action. Given the disposition of autonomous individuals dependent on one another because of the social division of labor, if we wish to obtain goods and services through exchange then our intentional activity presupposes a role, a positioned-practice, into which that activity must fit. That role, the role of bargainer and exchangist, causes us to treat others as means to our ends. Bargain, therefore, is double-edged. On the one hand it demands from us respect for the autonomy of others; on the other hand it invites us to view them instrumentally.

4. Summary

The reproduction of private autonomy and the social division of labor require the mechanism of private exchange. To reproduce private autonomy, exchange requires the consent of each person to be respected. No one can be forced to relinquish either his or her product or the measure of immunity from legal obligation that characterizes private autonomy. Obligation will attach only as a consequence of the voluntary surrender, at the instance of the other, of the right to do otherwise than he or she has done or promised. Each act of exchange, if it is to reproduce interdependent autonomy, requires both the reciprocal recognition of autonomy and also the reciprocal relinquishment of autonomy. Consideration is the legal expression of the structural dynamic that makes such conjoint surrender possible. Necessarily, failure to understand the connection of promissory obligation to social reproduction and grounds of liability has been an impediment to locating its operation. To appreciate how consideration expresses a promisee's commitment to relinquish autonomy we can disentangle three separate questions: (1) how do promises bind?; (2) why do they bind?; and (3) which promises bind?

a. *How do promises bind?* This depends on the analysis of individual human agency and its mode of connection to structures of social obligation. Intrinsic to the meaning of action is the capacity to do other than one does. A promise manifests an intention to constrain choice by expressing an intention not to do other than one has promised. Whether expressed by promise or performance, commitment, which constrains a person not to do otherwise than she has committed herself to do, can be enforced as social obligation.

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[188] And ourselves and nature as well. We use what we do as a means to obtain what we need in exchange; our activity is not an end in itself. *See supra* note 87.

b. *Why do promises bind?* This depends on the analysis of social reproduction. Promises are enforced to assure the reproduction of relations of interdependent autonomy. The exercise of social coercion is a consequence of the contradiction between autonomy and interdependence. Cooperation among individuals reflects a coincidence of autonomous self-interests. But self-interests change and do not do so synchronously. Either party may decide not to perform as promised. Enforcing promises assures social reproduction.

c. *Which promises bind?* This depends on the analysis of the social forms of attribution. An enforceable bargain promise must be part of a form of bargain attributable to both parties. Bargain is attributable to both parties where each: (1) has committed himself or herself to the relinquishment of autonomy through promise or performance; (2) has an intent to exchange; and (3) is conjointly responsible for the bargain because reciprocal inducement has made it their common product.

Taken as a whole, the requirements of promise or performance, intent and nexus of inducement themselves reproduce social relations of interdependent autonomy. Only manifested commitments of autonomous actors are enforced. The requirement of intent ensures that responsibility attaches only to an actor who exercises autonomous choice in pursuit of her own interests. In this way an autonomous actor can, with the cooperation of another and through exchange, overcome her social isolation in order to satisfy, within the division of labor, the generality of her needs. The requirement that each act of commitment induce the other ensures that the autonomy of each person will be constituted by the other. The act of commitment by either party to the bargain is an autonomous exercise of choice, but it is more—it is an exercise of choice recognized by another. The autonomy of each is socially constituted by being accepted as efficacious by the other. Forms of responsibility, therefore, are social forms presupposed by individuals in their activity that reproduce, and are reproduced by structures of interdependent autonomy.

V. CONCLUSION

I have argued that bargain is a social form presupposed by individual action that reflects and reproduces the structures of interdependent autonomy on which it depends. Such an explanation rests on the distinction introduced at the outset between events like a promise or a judicial decision and a deeper structure of being characterized by natural and social mechanisms, which in their conjunctural operation, produce such events. It is the social relation of interdependent autonomy presupposed by individual action that leads to the phenomenal event of an individual promising. Insofar as individuals are distributed in relations of autonomy

and dependent on the social division of labor, they must have recourse to exchange to fulfill the totality of their needs, and promising facilitates exchange. Equally, it is the tendency to reproduce this underlying social relation that leads to legal rules guiding the enforcement of promises once made—a promise that does not tend to reproduce the social relations of interdependent autonomy will not be enforced as a bargain promise.

A. Limits to the Bargain Mechanism

The last statement suggests limits to the bargain mechanism. On the one hand, mechanisms that lead to the enforcement of bargain promises will not apply where interdependent autonomy is not reproduced. On the other hand, bargain is not the only social form within which relations of interdependent autonomy are reproduced. Moreover, even where bargain exists, the mechanism expressed by consideration will not apply if there is no manifested commitment to relinquish autonomy. Of course to consider mechanisms that are alternative to or override consideration requires a comprehensive analysis of each such example fully specific to its own distinct features. Nonetheless, for the purpose of situating the analysis here presented, I will briefly suggest limits that frame my inquiry.

1. Where Relations of Interdependent Autonomy Are not Reproduced

First, where interdependent autonomy is not reproduced, the structure of relationships that generate the requirements of bargain do not operate and consideration cannot be a basis for enforcing promises. This does not mean that such promises cannot be enforced, but only that consideration cannot be appealed to as a reason.[189] Gifts, for example, do not function as a significant mechanism for the distribution of goods and services; gift promises, therefore, cannot be enforced through the use of the bargain mechanism. David Cheal has shown that a gift need not be considered a "sterile transmission," for the gift economy derives its significance from its contribution to the constitution of the small world of intimate social relationships around which we center our life.[190] But

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[189] Nor does this mean that the doctrine of consideration cannot be used. Consideration has been appealed to in many circumstances that do not involve an original relinquishment of autonomy, most notably in situations calling for use of the pre-existing duty rule. *See* RESTATEMENT (SECOND), *supra* note 70, § 73. But such use will not be reliable or coherent. The mechanism generating bargain generates the legal rule of consideration. Once the legal rule exists it can be applied in circumstances that have nothing to do with bargain. What it will lack in those circumstances is the ability to make sense of itself. *See infra* note 212 and accompanying text.

[190] The phrase "sterile transmission" was given currency by Fuller, *supra* note 70, at

from the point of view of exchange, Cheal shows that gifts are redundant.[191] For one thing, they add nothing to the donor's material well-being and, insofar as they are reciprocated, they may bring no net benefit to the donee either. Often a recipient receives things he could have more satisfactorily provided for himself. Moreover, gifts do not constitute or reproduce the autonomy of the donee.[192] The donor is not compelled by the nature of the transaction to appeal to another's reasons for action. Additionally, insofar as gifts are given primarily to friends and family for the purpose of creating an intimate community of interaction, it seems intrinsic to their function that they be voluntary.[193] In the world described by Cheal, mechanisms of coercive enforcement would inherently contradict gifts' function. Coercion would reflect the dissolution of the bond gifts are given to create, rather than any reproduction of them, and altruism seems awkwardly altruistic if it is coerced. At all events, to the extent we do enforce gift promises it is not as a consequence of the bargain mechanism.

Even where the dynamic of interdependent autonomy might occur, its reproduction may be overridden by other social mechanisms. As an

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815, quoting the French legal scholar BUFNOIR, PROPRIETE ET CONTRAT 487 (2d ed. 1934), and referred to the fact that a gift did not provoke a reciprocal exchange of goods or services. DAVID CHEAL, THE GIFT ECONOMY 14 (1988), argued that the gift economy is a moral, not a political, economy used not for the redistribution of resources but for the ritual construction of intimate social worlds. To complain of "sterile transmission," therefore, is to miss the creative social role played by gift—"gifts are used to construct certain kinds of voluntary social relationships." *Id.* at 14. Strictly speaking, his analysis is of gifts, rather than of gift promises, and it would be wonderful to have a comparable sociological study of gift promises. Still the force of his analysis showing that gifts function to reproduce small circles of social intimacy would seem to extend to gift promises. For a comparable view, see Eisenberg, *infra* note 193.

Charitable subscriptions or pledges, however, should be distinguished. These seem referable to a different social dynamic altogether. Charitable subscriptions seem more likely to concern the limits of the market mechanism in social life. Plainly the market has such limits and exhausts its efficacy, for example, with intervivos transfers. Institutions of social welfare also emerge to fulfill needs otherwise unmet or inadequately met by market exchange. Charitable subscriptions resemble a form of aggregating capital for the sake of responding to these limits. Thus, although Cheal does take into account church donations, for example, nonetheless a charitable pledge typically plays a different social role than the kind of gifts he describes.

[191] *See* CHEAL, *supra* note 190, at 12-14.

[192] *See supra,* Part IV.B.3.d.iv.

[193] *Cf.* Melvin Aron Eisenberg, *The World of Contract and the World of Gift* 85 (Feb. 15, 1996) (unpublished manuscript on file with author) (presenting affirmative reasons for not enforcing donative promises: gifts are about relationships cultivated voluntarily, not the value of goods and services; gifts make an appeal to better ourselves, to qualities of affection, trust, love and friendship; and enforcement of donative promises would commodify the world of gifts at the expense of such social values—donative promises "would be effectively converted into bills of exchange, and the follow-on gift would be a redemption of that bill").

example, consider the rule of judicial nonintervention in the marriage relation: "[t]he common law does not regulate the form of agreements between spouses . . . [i]n respect of these promises each house is a domain into which the King's writ does not seek to run and to which his officers do not seek to be admitted."[194] Historically, the family has been a preeminent site for the reproduction of patriarchal social relations and has been identified with the male and male dominance.[195] Even in community property states, the husband, until relatively recently, had exclusive management and control of community property.[196] An exercise of coercion to enforce bargains could not be used in this context without an intrusion on the patriarchal exercise of coercion historically legitimized there.

The resistance of the family to the penetration of bargain reflects the importance of differentiating among distinct social mechanisms. Promises enforced under the doctrine of consideration reproduce relations of interdependent autonomy. These are not limited to market or commercial promises, but extend to any circumstance where private autonomy coupled with the social division of labor obtains. Such enforcement may readily extend also to family members who relate to one another on a footing of autonomy (the uncle and nephew in *Hamer v. Sidway*, for ex-

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[194] Balfour v. Balfour, 2 K.B. 571, 573 (1919) (holding that a husband's promise to pay his wife a fixed sum per month does not give rise to a legally enforceable obligation). *Compare* RESTATEMENT (FIRST), *supra* note 70, at § 587 (1932), illus. 2 ("In a state where the husband is entitled to determine the residence of a married couple, *A* and *B* who are about to marry agree that the wife shall not be required to leave the city where she then lives. The bargain is illegal.") *with* Graham v. Graham, 33 F. Supp 936, 937 (E.D. Mich. 1940) (agreement between man and wife that husband refrain from work and accompany wife on her travels is unenforceable).

[195] Patriarchy refers to the constellation of social structures whereby men dominate, oppress, and exploit women. *See* Walby, *supra* note 5, at 20. During the nineteenth century, a husband had virtually absolute control over his wife. He was entitled to beat her, hold her in the husband's house against her will and runaways could be returned by force. The husband legally owned a wife's goods and wages or property she inherited, and he had the right of sexual access to her body. *See id.* at 163. Walby emphasized, however, that the household is declining in significance as a site of patriarchal reproduction relative to public forms of patriarchy, most notably in paid employment where forms of exploitation of women's labor perpetuate in changed form women's subordination to men. *See id.* at 59.

[196] Until 1975, CAL. CIV. CODE § 5125 (a) read:

> The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.

ample).[197] But the reproduction of patriarchal relations has depended not on legal enforcement of cooperative projects expressed in bargains; instead, it has rested on legal non-interference with male authority. In the last analysis, the distribution of efforts and responsibility within the household was left to male dominance, including violence, with little concern for state intervention.[198] In joint articulation the social relations of patriarchy and interdependent autonomy together generated a legal rule (of diminishing importance) denying, within marriage, enforcement of promises otherwise supported by consideration.

2. Where Relations of Interdependent Autonomy Are Reproduced by Mechanisms Other than Bargain

Damage remedies for injury to property in tort would also appear to reproduce structures of interdependent autonomy insofar as equivalent value is provided for loss wrongfully caused. Not long ago, it could have been suggested that promissory estoppel reflected some such mechanism. Gilmore thought promissory estoppel showed that contract was being absorbed within the body of tort,[199] as did others both before and after his obituary for contractual obligation. Farber and Matheson noticed that this was one point on which Critical Legal Studies and Law and Economics agreed:[200] Feinman and Feldman thought promissory estoppel rested on remedying a promisor's violation of a promissory duty of reasonable care[201] and Goetz and Scott compared broken promises to defective products.[202] Yet there could hardly be considered to exist a

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[197] *Compare Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891) where a young nephew was able to enforce a bargain against his uncle *with* Mary Louise Fellows, *His to Give; Hers to Trust: A Response to Carol M. Rose*, 44 FLA. L. REV. 329 (1992) (observing that cases like *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898), presuppose the imbalance of power implicit in patriarchal relations by denying that a granddaughter may constitute an equal bargaining partner with her grandfather).

[198] *See* WALBY, *supra* note 5, at 150 (challenging the idea that the state has a monopoly over legitimate coercion insofar as "[male] violence is legitimated by the state, since it takes no effective measure against it").

[199] *See* GRANT GILMORE, THE DEATH OF CONTRACT 87 (1974). The doctrine of promissory estoppel holds that where a person has made a promise with reason to know that it will provoke another to action, and the other does act in reliance on the promise, then the promise will be binding to the extent necessary to avoid injustice. *See also infra* note 209.

[200] *See* Farber & Matheson, *supra* note 3, at 903-04 (citing, inter alia, Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 854-56 (1983); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1266-70, 1314-21 (1980); *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 716-18 (1984).

[201] *See* Jay M. Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 884 (1985).

[202] *See* Goetz & Scott, *supra* note 200, at 1275.

consensus on the point today. In addition to those who consider the basis of liability in promissory estoppel to derive from tort, promissory estoppel is thought to be promise-based insofar as it is a mode of enforcing promises seriously made,[203] or contractual in the sense that a promisor probably intended to assume a legal obligation,[204] or assent based insofar as it compensates for defects in the human behavior model to which bargain appealed.[205] What seems to be agreed in the explosion of conflicting understandings is that promissory estoppel occurs now primarily in commercial contexts and recovery is most often measured by the expectation, not the reliance, interest.[206]

Significant questions are possible to distill. First, it seems clear that reliance alone cannot itself provide the basis for promissory estoppel because this explanation is circular in the same way traditional explanations of bargain promises as consideration were circular.[207] Whether one is injured by reliance is relevant only if one was entitled to rely. Second,

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[203] *See* Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 113 (1990) ("[T]he prospect of definite and substantial reliance generally required under Section 90 also screens for seriously considered promises."); Farber & Matheson, *supra* note 3, at 905 ("any promise made in furtherance of an economic activity is enforceable").

[204] *See* Barnett & Becker, *supra* note 4, at 496 ("[l]iability can be understood as contractual in the broad sense that the promisor apparently intended to assume a legal obligation under an objective standard.").

[205] *See* Juliet P. Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895, 911-12, 935 (1987) (arguing that formalist assumptions about human behavior ignored disparities of power, status, and knowledge, and ignored the enmeshment of parties in a relationship of trust and confidence or other ongoing relationship; the growth of promissory estoppel accordingly reflects the growing sensitivity of courts to such defects in the orthodox bargaining model).

[206] *See* Mary E. Becker, *Promissory Estoppel Damages*, 16 HOFSTRA L. REV. 131, 134-35 (1987) (expectation damages awarded even for donative promises); Farber & Matheson, *supra* note 3, at 907, 909 (discussing expansion of promissory estoppel to commercial contexts and also noting that "reliance plays little role in the determination of remedies"); Yorio & Thel, *supra* note 203, at 130 ("expectation is the routine remedy under section 90"); Phuong N. Pham, Note, *"The Waning of Promissory Estoppel,"* 79 CORNELL L. REV. 1263, 1266 (1994) (discussing the broadening of promissory estoppel to commercial cases under the impact of the comments and illustrations to the *Second Restatement*, but observing a general contraction of successful applications of promissory estoppel in state courts since the *Second Restatement*'s publication).

[207] *See* Barnett & Becker, *supra* note 4, at 446-47 (citing Barnett, *supra* note 81, at 274-76). Barnett writes:

> whether a person has 'reasonably' relied on a promise depends on what most people would (or ought to) do. We cannot make this assessment independently of the legal rule in effect in the relevant community, because what many people would do in reliance on a promise is crucially affected by their perception of whether or not the promise is enforceable.

Id. at 275; *see also* ATIYAH, *supra* note 13, at 37.

to say that promises are enforced under the doctrine of promissory estoppel whenever they are seriously intended is to reduce explanations of promissory estoppel to matters of form as recent scholarship has done with consideration. Finally, to appeal to an intention to be bound not only reduces promissory estoppel to a question of form, but fails also for the mistake involved in supposing that the reproduction of social structures depends on the intentions of the agents who act to reproduce them.[208] In other words, the problems of consideration analysis are being rediscovered in the analysis of promissory estoppel. Although promissory estoppel appears to be distinct from the bargain mechanism, it may be worth asking whether, nonetheless, it could be bargain based.

The grounds of liability for promissory estoppel cannot be found in bargain because the promisor lacks an intent to exchange. In a strict sense, she lacks both an intent to obtain and an intent to induce. The promisor promises, providing the promisee with a reason for action, and the promisee commits to a relinquishment of autonomy by acting in reliance on that reason. But by appropriating the reason offered by the promisor and making it the cause of his action the promisee has presumably in some respect misread the promisor. Thus, it follows from the elements stated in RESTATEMENT (SECOND) § 90 that that there can be no promissory estoppel where the promisor neither knew nor had reason to know that she had provided the promisee with a reason for action. Still, the forseeability requirement present in the promissory estoppel doctrine relaxes the requirement of intent to include liability for careless inducement.[209] What could justify this? It is true that under conditions of interdependent autonomy inducement is the means by which autonomous persons make an enforceable connection with others. Preserving the integrity of that mechanism may explain the extension of liability for acts accompanied by mere knowledge rather than a direct intention, and not only for knowledge and intention but for recklessness and carelessness as well. In any event, such questions are enough to show that the mechanism at work requires a distinct social explanation of its operation.

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[208] Recall that the garbage collector's reasons are (normally) not the reason garbage is collected. *See supra* note 48 and accompanying text. The point made by Professor Kostritsky, who also roots bargain in the intention principle, regarding dissatisfaction with the nineteenth-century formalist model of human behavior (freedom-seeking individuals acting without regard to disparities of knowledge, power or status) explains legal rules as responsive to behavioral stereotypes without exploring the possibility of an underlying social mechanism capable of functioning as the source of both the legal rules of bargain and of the behavioral stereotypes that seem so congenial to them.

[209] *See* RESTATEMENT, *supra* note 70, § 90, which provides that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

Even where interdependent autonomy is reproduced by bargain, there may be no original relinquishment of autonomy. If so, consideration cannot reflect a structural dynamic of the sort I have identified for an original commitment to exchange. Such a case will occur where, because of bargain, the parties are already bound to one another. Where parties are already bound by contract, efforts to modify their contractual arrangements would appear to involve other issues than those developed in the analysis of bargain formation. Pollock[210] and Patterson[211] thought so; and U.C.C. § 2-209(1) permitting modifications of contracts for the sale of goods without a showing of consideration suggests this also.[212] As Dawson wrote: "this central idea [bargain consideration], which had been familiar in England for more than three hundred years, was overloaded with additional tasks for which it was wholly unsuited. The distortions and evasions that the added functions produced have brought them all into disrepute."[213] Problems of modification do not concern principally the relinquishment of autonomy, but instead the potential for opportunism[214] in ongoing contractual relations either under the influence of mistake,[215] changed circumstances,[216] order of performance (one who

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[210] *See* SIR FREDERICK POLLOCK, PRINCIPLES OF CONTRACT 202 (9th ed. 1921) ("The doctrine of consideration has been extended with not very happy results beyond its proper scope, which is to govern the formation of contracts, and has been made to regulate and restrain the discharge of contracts.").

[211] *See* Patterson, *supra* note 58, at 936-37. The pre-existing duty rule provides that performance of a duty already owed to the promisor cannot be consideration for a new promise. This precludes modification of an existing bargain by one side only—for example, where a contractor has agreed to pave a driveway for $5000, he cannot subsequently ask for the promise of an additional sum because he underestimated the cost of the job. Patterson argued that the requirement of consideration embodied in the pre-existing duty rule should be dropped as to all such second bargains.

[212] *See* UCC § 2-209(1) (abolishing the pre-existing duty rule and allowing for sales contracts to be modified without consideration); WHITE & SUMMERS, *supra* note 186, § 1-6, at 31, 34-37 ("[r]eason and justice do not require this inflexible rule;" "sections 1-203 [good faith]; 2-302 [unconscionability]; 1-103 [supplementary principles of law and equity] should be adequate policing weapons"). *But cf.* Robert A. Hillman, *Policing Contract Modifications Under the UCC: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 862 (1979) (arguing that the Code provides no effective guidance for policing modifications under § 2-209(1)).

[213] *See* JOHN P. DAWSON, GIFTS AND PROMISES 198 (1980). Dawson argued that by not drawing a distinction between contract formation and other functions, consideration had become "a scrap-collector" of contract doctrine. *See id.* at 207.

[214] *See, e.g.*, STEVEN J. BURTON & ERIC G. ANDERSEN, CONTRACTUAL GOOD FAITH 416 (1995) ("[t]he opportunism approach makes sense in the 'hold-up' cases involving contract modifications rendered unenforceable by the preexisting duty rule"); Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 532-52 (1981).

[215] *See, e.g.*, Watkins & Son v. Carrig, 21 A.2d 591 (N.H. 1941) (holding that a contract to excavate property could be enforceably modified without new consideration

has already received performance may take advantage of one who has not), or, more generally, in an "attempt by one party to recapture opportunities foregone upon contracting."[217] Consideration has been pressed into use to solve such problems, of course, but these are not relinquishment of autonomy problems in the sense that those occur at the time of original contract formation, and contract modification is inappropriately viewed as a consideration problem. Features comparable to consideration analysis may be in play, but they are likely to be overridden by the impact of other relationships. Similarly, any time the parties find themselves in a pre-existing contractual relationship—promises to repay debts barred by the statute of limitations[218] or bankruptcy,[219] promises to perform a duty in spite of non-occurrence of a condition,[220] or to perform a voidable duty,[221]—in each such case the relinquishment of autonomy does not drive the transaction. The *Restatement* is, therefore, correct to include such promises under the topic "Contracts Without Consideration."[222]

B. Enforcing Bargains

Key to explaining the doctrine of consideration has been understanding the distinction between explanations that depend on the social structures of a market economy and explanations that depend on individual agency. We have seen that the paradox of enforcing promises cannot be understood apart from an appreciation of the function of promising within the dynamic of social reproduction: promises are enforced to facilitate the reproduction of exchange. In so doing, they facilitate the reproduction of the coupled relationship of autonomy and the social division of

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where hard rock, instead of the soft dirt anticipated, was encountered).

[216] *See* RESTATEMENT (SECOND), *supra* note 71, § 89 (stating that a contract may be modified without consideration in the face of unanticipated circumstances where the modification is fair and equitable).

[217] Burton, *supra* note 17, at 377; *see also* BURTON & ANDERSEN, *supra* note 214, at 385 (good faith applies differently because the parties are not strangers seeking to work out a deal for the first time, but persons who have contracted seeking to use their contract as "the basis for a potentially prolonged or modified legal relationship").

[218] *See* RESTATEMENT (SECOND), *supra* note 70, § 82 (stating that a promise to pay an antecedent debt is unenforceable because of the bar of the statute of limitations).

[219] *See id.* § 83 (stating that a promise to pay a debt discharged in bankruptcy is binding). *But see* 11 U.S.C. § 524(c), (d) (imposing requirements for enforceability of such promises under federal bankruptcy law).

[220] *See* RESTATEMENT (SECOND), *supra* note 70, § 84 (noting that a promise to perform in spite of the non-occurrence of a condition qualifying the duty of performance is binding).

[221] *See id.* § 85 (maintaining that a promise to perform a contract previously voidable by the promisor is binding).

[222] *See id.* at 207 ("Topic 2. Contracts Without Consideration").

labor on which exchange depends. As Atiyah has argued, there can be no explanation of the obligation of promise without an appeal to social context.[223] Explaining the social contribution of bargain for exchange, however, does not fully explain why the act of one individual is considered an enforceable bargain promise but not the similar act of another. An adequate explanation must capture both the dimension of social structure and the dimension of individual agency, as well as the mode of connection between them.

Society, Bhaskar explains, is made up of an ensemble of relations: promisor-promisee, male-female, employer-employee, parent-child, and so forth.[224] Such relations, together with innumerable others, are gathered into a richly complicated, multi-dimensional structure that from day to day and year to year reproduces itself. As it reproduces itself, it is itself transformed. But it is transformed, as it is reproduced, by the individual agency of particular persons. Individual actions presuppose the social forms within the framework of which they occur. The social forms presupposed, however, exist only in virtue of such individual acts.[225] The institution of promising exists only in the promises of particular promisors. But any particular promisor or promisee confronts the forms of promising as given.

Among those forms are bargains. Exchange makes possible the distribution of aggregate goods and services in a society characterized by relations of interdependent autonomy. Bargains, because they commit a promisor and a promisee to exchange, are enforced because they tend to facilitate this social process. Depending on the intent of the parties, they may be of one of three types: (1) a bargain for a future exchange (a promise becomes binding because another promise is given for it); (2) a bargain for a half-completed exchange (a promise becomes binding because a completed performance is given for it); and (3) a bargain for an attempted exchange (a promise becomes conditionally binding because an attempt to perform has begun.)

Like the commitment of a promise, the role of bargain, a social form for the exchange of commitments, is to provide a mode of connection between individual agency and social structure. Bargain filters the commitments of individuals pursuing their own disparate purposes and

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[223] *See* ATIYAH, *supra* note 13, at 127 ("It is not possible to give a coherent explanation of why promises should be morally binding unless one first posits a social context, within the framework of which obligations arise.").

[224] *See* PON, *supra* note 5, at 36.

[225] *See id.* at 38.

desires, distinguishing those that tend to reproduce interdependent autonomy from those that do not.[226]

For a bargain to be attributed to an individual, that person must have engaged in a promise or performance that manifests a willingness to relinquish autonomy. Because it is intrinsic to the concept of action that the actor could have done otherwise, any act can commit the actor in this way and bear such meaning. The requirement of a performance, therefore, is a requirement of manifested commitment traceable to a particular actor. Similarly, the meaning of a promise is a commitment not to do otherwise than one has promised, and a promise, as a consequence, is an act in the sense that once made, it takes its place in the structure of meaning constructed by communication. A person who has promised has committed herself. The promise may be kept or broken, changed or abandoned; the making of a promise does not in itself transform the material world in any way except in the trivial sense of moving air or inking a page. But the meaning given is that a person has constrained herself to act in a certain way in the future. In either case, whether carried by promise or performance, a commitment once manifested by words or action cannot be erased. As such, it provides a foundation for enforcement.[227] The question is what must accompany the commitment given for it to become irrevocable social obligation.

First, where a promise is given, it must be a true, not an illusory promise. A promise can count as a relinquishment of autonomy only if performed or enforced, but a promise cannot be enforced if it manifests no intention to constrain its maker. Moreover, within the framework of

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226 *Cf. id.* at 35:

> It should be noted that engagement in a social activity is itself a conscious human action which may, in general, be described either in terms of the agent's reason for engaging in it or in terms of its social function or role. When praxis is seen under the aspect of process, human choice becomes functional necessity.

227 *Cf.* KENNY, *supra* note 120, at 79-80:

> Once one has set out what is involved in the attribution of mens rea (namely, an inquiry into the agent's reasons for his action) and what is the purpose of punishment (the provision of reasons for abstaining, through fear, from anti-social action) the connection between mens rea and responsibility becomes self-evident: the two concepts fit together like a key and a lock. The connection between the deterrent purpose of punishment and the necessity of mens rea if a crime is to be imputed is made *via* the concept of practical reasoning: the attachment of penal sanction to legislation is precisely an attempt to affect the practical reasoning of citizens.

Anthony Kenny would no doubt question many of the propositions of critical realism—that reasons are causes, for example, is a proposition he denies in chapter two of the text just referred to. But his metaphor of a key in a lock here provides a good example of precisely the mode of connection between intentional agency and social structure that Bhaskar suggests the understanding of social relations requires.

bargain, for an act or promise to be the subject of social obligation it must be accompanied by an intent to exchange. This has its immediate source in the circumstance in which each formally autonomous individual finds himself or herself—each is autonomous but not self-sufficient. Therefore, individuals are driven to exchange to meet the totality of their needs. The objects which they find available to them are the objects of their intent and promising facilitates the exercise of that intent. On the one hand, the intent to exchange is an intent to obtain the performance of another. On the other hand, in recognition of the autonomy of the other, the intent to obtain is coupled with an intent to induce; by offering to surrender a performance of her own a person makes an appeal to the other's reasons for acting.

Even manifested commitment accompanied by an intent to exchange, however, is not enough to establish an enforceable bargain unless the promisor's proposal actually produces a result in the sense that it does function to induce the commitment of the other. The promise of the promisor must induce consideration in return. The prospect of the other's performance provides a reason causing the promisor to propose a bargain, but the promisor's desire must take a form that respects the other as a center of causal power. The promisee must himself decide to surrender his autonomy. Each can obtain what he or she desires only by inducing the other to exercise freely a decision of his or her own.

Together these requirements themselves reproduce the social relation of autonomy within the context of the division of labor. Relinquishing autonomy ensures that responsibility attaches to an autonomous actor who has manifested a commitment to exchange. The intent to exchange, which accompanies the act, ensures that the mechanisms of exchange respond to the choices of separate persons who nonetheless cooperate with one another and together use exchange to transform the world according to plan. The nexus of reciprocal inducement ensures that the autonomy of each is constituted by the other. Neither acts except in consequence of the consensual commitment of the other. The autonomy of each is socially constituted by being accepted as efficacious by the other.

And, where it is not accepted as efficacious, the social constitution of the other's autonomy is compromised, as Patricia Williams has demonstrated so powerfully. Recall her narrative of the young white Benneton employee blowing pink bubble gum in her face through a glass door mouthing the words "we're closed," with other shoppers going about their business inside at 1:00 P.M. on Saturday afternoon some few days before Christmas.[228] Or consider her explanation of why she insisted on

[228] *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 44-45 (1991).

signing a detailed lease complete with fine print in circumstances where a friend would have been more than satisfied with a handshake:

> I was raised to be acutely conscious of the likelihood that no matter what degree of professional I am, people will greet and dismiss my black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational, and probably destitute. Futility and despair are very real parts of my response. So it helps me to clarify boundary; to show that I can speak the language of lease is my way of enhancing trust of me in my business affairs. As black, I have been given by this society a strong sense of myself as already too familiar, personal, subordinate to white people. I am still evolving from being treated as three-fifths of a human, a subpart of the white estate. I grew up in a neighborhood where landlords would not sign leases with their poor black tenants, and demanded that rent be paid in cash; although superficially resembling Peter's transaction, such informality in most white-on-black situations signals distrust, not trust. Unlike Peter, I am still engaged in a struggle to set up transactions at arm's length, as legitimately commercial, and to portray myself as a bargainer of separate worth, distinct power, sufficient *rights* to manipulate commerce.[229]

Professor Williams's personal experience confirms the relational value of autonomy and the way in which, through bargain, one person's autonomy is constituted in consequence of its recognition by another. Making this explicit, she writes:

> For me, in contrast, the lack of formal relation to the other would leave me estranged. It would risk a figurative isolation from that creative commerce by which I may be recognized as whole, by which I may feed and clothe and shelter myself, by which I may be seen as equal—even if I am a stranger . . . .On a semantic level, Peter's language of circumstantially defined need, of informality, solidarity, overcoming distance, sounded dangerously like the language of oppression to someone like me who was looking for freedom through the establishment of identity, the formulation of an autonomous social self.[230]

Emphasizing the perspective that comes from being without rights in our common legal history, Williams continues: "The legal system did not provide blacks, even freed blacks, with structured expectations, promises, or reasonable reliances of any sort."[231] Accordingly, the desire for rights stems from:

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[229] *Id.* at 147-48. "Peter" refers to Professor Peter Gabel with whom Professor Williams co-taught a Contracts class in New York. Both looked for apartments. Professor Gabel paid a $900 deposit in cash to strangers on the strength of a handshake.

[230] *Id.* at 148.

[231] *Id.* at 154.

> existing in, a world without any meaningful boundaries—and 'without boundary' for blacks has meant not untrammeled vistas of possibility but the crushing weight of total—bodily and spiritual—intrusion. . . . The concept of rights, both positive and negative, is the marker of our citizenship, our relation to others.[232]

From legacy of history to oppression reproduced in the present, exclusions from exchange still compromise the construction of autonomy on which a market society depends. Yet, in *The Rise and Fall of Freedom of Contract*, Professor Atiyah argues that anti-discrimination legislation represents a curtailment of freedom of contract; rather than presenting such lawmaking as an expansion of bargain disembarrassed by historical baggage in no way intrinsic to its functioning, he writes:

> I turn now to consider a number of other illustrations of the declining importance of consent in contractual relationships. There are, first, a number of situations where a party's freedom to contract or not to contract, his freedom to choose with whom he shall contract, has been whittled down. The new anti-discrimination laws, which prohibit (in various circumstances) discrimination on grounds of racial origin, or on grounds of sex, are illustrations of this tendency. The arbitrary caprice of a would-be contracting party is no longer tolerable in matters of this nature, where free choice is overridden by socially set values.[233]

"[F]reedom to contract or not to contract" is here confused with other generative mechanisms of social life. The expression of volition required for contractual consent must reflect a willingness to surrender the insulation from social interference that characterizes private autonomy. But the autonomy presupposed by contractual relationships is relational, and in the reproduction of interdependent autonomy resort to exchange is presupposed. Nothing in the reproduction of the social relations that gives rise to contractual consent, reflects or depends upon a unilateral exercise of arbitrary caprice extended to race or gender. Instead, it is exclusion from exchange that compromises the social function of bargain. The refusal to obtain a thing from a woman one would purchase from a man or the denial of goods and services to a person of color one would make available to someone white denies the other's existence as a center of causal power whose reasons can change the world. It denies another's capacity to exercise autonomy. It compromises the social constitution of personal autonomy. Where such refusals to deal occur, the formal autonomy of bargain is being used, parasitically, to reproduce

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[232] *Id.* at 164.

[233] ATIYAH, *Supra* note 88, at 735-36; P.S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 22-23 (5th ed. 1995).

the social oppressions of patriarchy and white supremacy, distinct and different mechanisms of social life.[234] To blunt their reproduction does not in any way compromise the consent constituted and reproduced by bargain or exchange or interdependent autonomy. No formal autonomy presupposed by contract is undermined. No one's ability to obtain anything he or she might want from exchange is limited. No one's ability to refrain from resort to exchange is curtailed. Such legislation may prevent the reproduction of other social relations, but it does not interfere with bargain. Free choice is liberated, not overridden, by legal action taken to foreclose such exclusions from exchange. Arguments such as those on which Atiyah relies err insofar as they assume that accounts of behaviors and policies that make up the surface forms of social life exhaust social reality. Theory can accurately describe everyday affairs only by grasping the underlying mechanisms responsible for their occurrence.

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[234] *Cf.* Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991) (presenting evidence of differential treatment in new-car negotiations leading to white women, black men and black women paying forty-percent, double and triple the mark-up respectively of white-male testers).