Contract Theory in Nineteenth-Century Indiana Courts: An Argument for Non-Bargain Based Promissory Liahility

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INTRODUCTION

This Note grows out of my own attempts to understand the basic nature of contractual obligation. It seemed to me that what is still the basic lesson of many Contracts classes, that contractual liability grows out of what Oliver Wendell Holmes called "the relation of reciprocal conventional inducement, each for the other, between consideration and promise[,]"[1] is overly limited. This view not only fails to capture the richness and nuance possible in a more inclusive theory, but also ignores the reality that promissory liability has consistently been found without bargain.

While it is true that contract theory has recognized the existence of these non-bargain cases, it has continually classified them as illegitimate or, at best, based upon a historical theory of detrimental reliance distinct and separate from the prevailing bargain theory. Again though, this solution is inadequate. Implying that detrimental reliance cases are either grounded in idiosyncratic notions of "justice," or that cases in which promissory liability has been found absent either bargain or demonstrated reliance are wrongly decided, ignores the principled connections between these cases and cases involving bargain.

This Note examines Indiana contract cases of the nineteenth century in an attempt to discern a more coherent, broad-based theory of contractual liability. Indiana is normally considered a "bargain theory" state,[2] and a cursory reading of the nineteenth-century case law supports this conclusion. However, a closer analysis supports the argument that the Indiana courts were in fact deciding cases according to a more broad-based, inclusive theory of contractual liability that was respectful of common law forms of liability, contemporary moral understandings, and public policy arguments. If this is true, modern courts should feel comfortable doing the same. There is no need to articulate various, singular theories of liability, or to attempt to shoehorn factual situations into such theories, when contractual liability has in fact always been based upon a multifaceted analysis.

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1. OLIVER WENDELL HOLMES, THE COMMON LAW 230 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

2. *See* RESTATEMENT (FIRST) OF CONTRACTS: INDIANA ANNOTATIONS § 75 (1933) [hereinafter INDIANA RESTATEMENT].

I. BARGAIN THEORY

The historical antecedents of modern contract actions are the common law writs of debt and assumpsit.[3] The basis of liability under these actions (by which I mean the underlying reason *why* the promise is enforced) is fundamentally moral. For instance, when *A* receives a benefit from *B*, *A* is obligated to pay *B* the value of that benefit because the benefit is something owned by *B*.[4] Failure to pay would constitute an unjust taking.[5] *B* could also bring a legal action (in the form of a writ of special assumpsit) when he had suffered some detriment by relying on representations made by *A*.[6] This action was essentially analogous to a modern negligence case.[7] *A*'s duty to *B* is grounded in *A*'s responsibility to act so as not to harm *B*. In both of these writs, the question of legal liability essentially collapses into the question of moral duty: Has *A* done something such that he should be required to pay *B*?[8]

By the late sixteenth century, *Strangborough and Warners Case*[9] showed that the writ of special assumpsit could be used to enforce exchanges of promises. In *Strangborough*, the court finds that when *A* promises to give *B* £10 on one day in return for *B*'s promise to give *A* £10 the next day, *A*'s promise is enforceable.[10] Whereas before, thc detriment to *B* would have been measured according to the status quo that existed before *A*'s promise,[11] it appears that now *B* can recover for a perceived gain he did not achieve because of *A*'s failure to fulfill the promise.

Strangborough does expand the writ of assumpsit, but does not necessarily involve a radical reconceptualization of the basis of promissory liability. Other cases decided in that same year suggest that the court was still fundamentally concerned with remedying concrete, cognizable injuries. For instance, in an unnamed case decided in the same year as *Strangborough*, the court held that a man who had received £20 in return for promising to assign a lease for which he was not the lessor was liable because the man "might purchase the house and then assign [the lease]."[12] In *Rawson and Browns Case*,[13] the court held that promise of an escapee from debtor's prison to pay £10 in return for his creditor's allowing him to remain at large was unenforceable

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3. *See* E. ALLAN FARNSWORTH, CONTRACTS § 1.6 (2d ed. 1990).

4. *See* A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 75–76 (1975) (citing W.T. Barbour, *The History of Contract in Early English Equity*, *in* 4 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 1, 26–28 (Paul Vinogradoff ed., 1914)).

5. *Id.*

6. FARNSWORTH, *supra* note 3, § 1.6, at 17.

7. *See* SIMPSON, *supra* note 4, at 218–19.

8. *Id.* (citing Calthorpe's Case, 3 Dyer 334b, 336b, 73 Eng. Rep. 756, 759 (K.B. 1574)).

9. 4 Leo. 3, 74 Eng. Rep. 686 (K.B. 1588) (asserting that "a promise against a promise will maintain an action upon the case" but not stating why this is so).

10. *Id.*

11. *See* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 142 (1979) (arguing that the protection of expectation was not generally recognized in eighteenth-century common law). Of course, the existence of *Strangborough* strongly suggests that, at least in certain circumstances, future benefits would be recognized.

12. *Strangborough*, 74 Eng. Rep. at 686.

13. 4 Leo. 3, 74 Eng. Rep. 686 (K.B. 1588) [unnamed case].

because the escapee would not be receiving anything (his liberty) that he did not already enjoy. In the first case, the man has already received £20, and because it is possible to fulfill his promise, he is obligated to do so. In the second, the court refuses to find an enforceable promise because it is unable to value the debtor's freedom from the possibility of future imprisonment. There is no presumption that the fact of an exchange of promises is alone sufficient to ground promissory liability. Instead, the court is deciding whether or not a party has received something of value. These cases suggest that the promise to lend money in *Strangborough* is enforceable because the court is able to understand the injury caused by the defendant's failure to fulfill his promise. This may be due to the specific facts of the case not reported, or perhaps the court recognizes that since the plaintiff in *Strangborough* presumably needed the money for some beneficial purpose, not receiving it caused an injury.

This tangible benefit or detriment, as determined by the court, was the *consideration* that rendered a promise enforceable.[14] Such consideration was "the sum of the conditions necessary for an action in assumpsit to lie."[15] Thus, the question of enforceability collapses into the inquiry of whether or not there is an underlying unjust enrichment (benefit) or tortious harm (detriment).[16] This is the *benefit/detriment theory* of promissory liability.

In contrast to the benefit/detriment theory, the *bargain theory* of promissory liability may speak the language of benefit/detriment but grounds itself on a different bottom. Under the bargain theory, promissory liability exists only when consideration (defined as the specific benefit or detriment) is contextualized within offer and acceptance. Williston tells us that "[a]cceptance of an offer is necessary to create a simple contract, since it takes two to make a bargain[,]"[17] and, relying on this presumption, goes on to define consideration as "a detriment incurred by the promisee or a benefit received by the promisor *at the request of the promisor*."[18] Due to the additional requirements of offer and acceptance, the definition of consideration now includes a formal "request" not present at common law. This apparently minor limitation allows Williston to follow Oliver Wendell Holmes[19] in articulating a new basis of promissory liability.

When Williston writes, "[i]f it is said . . . that a promise has no consideration, the meaning properly is that nothing was in fact given in exchange for the promise[,]"[20] we can see that the enforceability of a promise is now tested not by the presence of a cognizable injury but instead by the presence or absence of bargain. Other considerations, such as the moral responsibilities of the parties, drop out of the equation. Consideration is again a shorthand for the totality of circumstances giving

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14. FARNSWORTH, *supra* note 3, § 1.6, at 20.

15. *Id.*

16. At common law, a promise might also be enforceable on an action in covenant (promises made under seal). *Id.* § 2.16, at 86. However, the action of covenant did not evolve into a general contractual remedy and remains a separate, limited basis of liability. *Id.* § 1.5, at 14.

17. SAMUEL WILLISTON & GEORGE THOMPSON, SELECTIONS FROM WILLISTON'S TREATISE ON THE LAW OF CONTRACTS § 64, at 77 (rev. ed. 1938).

18. *Id.* § 102, at 128 (emphasis added).

19. *See generally* HOLMES, *supra* note 1, at 230 (explaining what constitutes consideration).

20. WILLISTON & THOMPSON, *supra* note 17, § 101, at 128.

rise to promissory liability, but those circumstances have been reduced to the presence or absence of bargained-for exchange.

This shift has important consequences for the scope of enforceable promises. At common law, if *A* gives $100 to *B*, and, later on, *B* promises to pay *A* the $100, *B*'s promise is enforceable.[21] A subsequent promise to pay for a benefit already received was sufficient evidence of a moral (and legal) obligation to pay. Under the bargain theory, however, such "past consideration" is not sufficient to support promissory liability.[22] There has been no bargained-for exchange and hence there is no promissory liability.

Similarly, a finding of promissory liability based upon detrimental reliance should be cognizahle under the benefit/detriment theory provided that the fact pattern is sufficiently unique to allow for the formulation of a legal principle.[23] Again, though, under bargain theory it does not make sense to enforce a promise simply because the other party was silly enough to change his position upon the strength of that promise.

Third, though exchange as the basis of liability does not logically preclude judicial inquiry into the fairness of contracts, the shift to bargain theory reflects and reinforces a basic judicial distrust of such inquiry. By the nineteenth century, courts had begun to embrace the ideals of economic liberalism, including the idea that the value of a good is not objective, but is instead a subjective quantity exactly equal to what an individual buyer is willing to pay.[24] If value is determined by the price demanded in exchange, and the bargained-for exchange is the hasis of promissory liability, then it does not make sense to unmake a contract beeause the consideration (that which has been exchanged) is of insufficient value. The consideration has no value other than that determined by the bargaining process. As early as 1871, Langdell had captured this idea by saying "*at law* there is a perfect equality in value between consideration and promise. Therefore, the promise is given and is received in exchange for the consideration and for no other purpose."[25]

In fairness though, Williston never suggests that the subjectivity of value renders the rule that there must be a valuable consideration completely inconsequential. Offers to forbear a claim for damages are not sufficient consideration when there is no basis for the claim, despite the fact that such offers may be bargained for;[26] and the doctrine of nominal consideration has always allowed courts to undo a transaetion when the value given is insufficient to support an inference of real bargain.[27] Williston is being properly precise when he writes "anything *which fulfills the requirements of*

21. FARNSWORTH, *supra* note 3, § 1.6, at 19.

22. WILLISTON & THOMPSON, *supra* note 17, § 142, at 205. Williston argues that case law to the contrary is properly considered to be instances of "waiver" rather than findings of contractual liability.

23. For a list of mid-nineteenth century cases demonstrating this possibility, see ATIYAH, *supra* note 11, at 460.

24. *See generally* ATIYAH, *supra* note 11, at 71 (describing the concept of subjective market value); *id.* at 421 (discussing the transition to fixed pricing in building contracts in early nineteenth-century England).

25. CHRISTOPHER COLUMBUS LANGDELL, SUMMARY OF THE LAW OF CONTRACTS 71 (1871) (emphasis added).

26. WILLISTON & THOMPSON, *supra* note 17, § 135, at 192.

27. *See id.* § 115, at 158–59.

consideration will support a promise whatever may be the comparative value of the consideration, and of the thing promised."[28]

The increased unwillingness of nineteenth-century courts to examine the equities of an exchange is one aspect of a more general consequence of the shift to bargain theory. If the basis of promissory liability is the presence of bargained-for exchange, it does not make sense to appeal to a more generalized theory of moral obligation when making a claim.[29] At common law, it would be intelligible to make a claim on the broad-based notion that the defendant "owed" something to the plaintiff.[30] For example, a son promises to give his father a gown to keep him warm.[31] Since, under the common law, consideration means that the promise was made under such circumstances that it is proper to attach legal liability,[32] there is no bar to enforcement of this promise. The son's preexisting duty is the necessary consideration. Under the bargain theory, a promise is not enforceable merely because it expresses a preexisting moral duty. Without a bargain, such duties are not cognizable at law. In this sense, bargain theory is amoral and, to the extent that these duties are coterminous, so is the contract.

II. BARGAIN THEORY IN THE INDIANA COURTS

It should be apparent that allegiance to the benefit/detriment theory (and its underlying moral considerations) does not preclude a finding of promissory liability based on bargain. The "detriment" in a bargaining situation is quite simply the loss of the value of the bargain. When we say, therefore, that a given jurisdiction is a "bargain theory" jurisdiction, we properly mean that the jurisdiction has adopted bargain as the sole basis of promissory liability and precludes other possible "considerations." This section looks at cases decided by the Indiana courts in the nineteenth century to determine the degree to which, historically, Indiana is a bargain theory state.

In *Hardesty v. Smith*,[33] the court stated that "[t]he doing of an act by one *at the request of another*, which may be a detriment . . . [to the promisee] . . . or . . . a benefit . . . to the promisor . . . is a legal consideration."[34] This definition is pure Williston, and, as we have seen, represents an understauding of consideration conditioned by the additional requirements of offer and aceeptance. However, one case in which liability was found because there was a bargain is not proof that Indiana was a bargain theory state. In fact, analysis of the very cases cited by the Indiana commentators to the *FIRST RESTATEMENT OF CONTRACTS* shows that Indiana courts were never willing to fully accept the implications of bargain theory, particularly its amoral aspect.

Boston v. Dodge[35] is the first case cited by the Indiana commentators as having been decided in accordance with the bargain theory of consideration.[36] The plaintiff, Boston,

28. *Id.* at 158 (emphasis added).
29. *See id.* § 147, at 210–11.
30. SIMPSON, *supra* note 4, at 323.
31. *Id.* (recounting the hypothetical).
32. *Id.* at 321.
33. 3 Ind. 39, 41 (1851).
34. *Id.* (emphasis added).
35. 1 Blackf. 19 (Ind. 1818).
36. INDIANA RESTATEMENT, *supra* note 2, § 75, at 22.

had entered upon public land and made improvements to it.[37] Dodge bought the land from the United States and promised Boston $80 if Boston would give up possession and any claim to legal title.[38] Boston claimed that this promise was made in consideration of the improvements made upon the land.[39]

The court frames the legal question of the case as: "Was the promise of Dodge such an undertaking as would, agreeably to the rules of law, support an action of assumpsit?"[40] It goes on to cite to the rule: "[I]n cases of past and executed considerations for express promises, the general rule is, that the declaration must aver the services to have been rendered upon the request of the defendant."[41] Following this line of reasoning, the court holds that there is insufficient consideration. The opinion reads, "[h]ad the improvement been made at the instance and request of the defendant after he purchased the land, [there would be consideration]."[42]

While this language, without being contextualized withiu the opinion, clearly supports the view of the Indiana commentators that this is an example of bargain theory, such surface analysis missed the deeper point of *why* the court refused to find for the plaintiff in this case. The court states that Boston is precluded from recovering for the improvements because "[i]f the improvement was a benefit to any owner, it was to the United States, who were the owners at the time the improvement was made."[43] Dodge does not "owe" anything to Boston because he was not the recipient of any benefit. Indeed, Dodge's promise is a *nudum pactum* not simply because he did not request the improvements, but because there was no *debt* owed to Boston *by Dodge*: "Dodge was entitled to possession from the moment he became a purchaser [from the United States] and Boston could have no legal claim against him for giving up that which was the property of Dodge."[44] The underlying theory of the case is that, should the court find for Boston, it would be underwriting a form of extortion. Boston is legally and morally bound to yield possession to the lawful owner, Dodge.[45]

The *Boston* court's view that promissory liability is grounded in concepts of moral duty is made clear by the statement "[w]here a man is under a moral obligation to pay a debt, or perform a duty, an express promise to perform that duty, or pay that debt, will be supported by the previous moral obligation . . . ."[46] Thus, while the court accepts the old rule that "a promise against a promise will maintain an action upon the case,"[47] it does so on the understanding that this situation creates a legally cognizable obligation, a debt.

This is not to say that the *Boston* court simply reaffirmed the common law sphere of promissory liability. After disposing of the particular legal question, the *Boston* court goes on to articulate limits on promissory liability responsive to perceived public

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37. *Boston*, 1 Blackf. at 19.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 20 n.1.
42. *Id.* at 19.
43. *Id.* at 20.
44. *Id.*
45. *Id.*
46. *Id.* at 21 n.1
47. Strangborough and Warners Case, 4 Leo. 3, 74 Eng. Rep. 686 (K.B. 1588).

policy concerns. The court cites approvingly to a New York case decided upon similar facts. [48] In that case, the plaintiff entered onto the defendant's land and made improvements which the defendant later promised to pay for.[49] Finding that the plaintiff had no cause of action, the New York court held that since the consideration was past, no moral obligation was shown, and that, absent an express or implied request, the action would not stand.[50] The court stated its bclief that this rule was necessary because to allow recovery would be to "encourage depredations on private property."[51]

Note, though, that the New York court does not say that moral obligation will not support a promise, or that past consideration is invalid. Its holding is limited to the proposition that in cases of past consideration there is no *prima facie* showing of moral obligation. The New York court does not undercut moral obligation as a basis for liability, but the limits the scope of legally cognizable moral obligations in response to public policy coneerns. Likewise, the *Boston* court takes pains to note that a finding of liability in the *Boston* case would generate a rule of law allowing that purchase at a sale is not a guarantee of right to possession.[52] Taken as a whole, the *Boston* decision indicates that, while the essentially moral concepts of debt and duty continued to provide the basis of promissory liability, the Indiana courts were beginning to define and limit that liability in response to public policy arguments.

This process is particularly evident in the 1855 case, *Wiggins v. Keizer*.[53] Cited by the Indiana Commentators for the proposition that moral obligation is insufficient to support promissory liability,[54] the case involves a suit brought against Wiggins, testator to the estate of John Mullen, upon a promise by Mullen to pay for the maintenance of Mullen's illegitimate child. The plaintiff/appellee argued that "the moral obligation upon the father is suffieient to sustain an express promise."[55] The *Wiggins* court allowed that this was the general rule,[56] but went on to say:

> The manifest impracticability of extracting from the numberless moral duties which may be demonstrated by the science of ethics, a rule of law applicable to the business relations of life, shows very plainly that those duties of imperfect obligation are not such as are contemplated by the rule when properly understood. . . . "An express promise can only revive a precedent good consideration which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law . . . ."[57]

Thus, it would seem that *Wiggins* limits promissory liability founded on moral obligation to situations in which the original action has been foreclosed by some

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48. Frear v. Hardenbergh, 5 Johns. 252 (N.Y. Sup. Ct. 1810).
49. *Id.*
50. *Id.*
51. *Id.*
52. Boston v. Dodge, 1 Blackf. 19, 20 (Ind. 1818).
53. 6 Ind. 252 (1855).
54. *See* INDIANA RESTATEMENT, *supra* note 2, § 75, at 23.
55. *Wiggins*, 6 Ind. at 254.
56. *See id.* at 257.
57. *Id.* (quoting Wennall v. Adney, 3 Bos. & Pul. 247, 127 Eng. Rep. 137, 138 n.1 (C.P. 1802)).

positive rule of law, for example debts avoidable due to infancy, expiration of the statute of limitations, or bankruptcy. The suggestion is that outside of these specific exceptions there can *only* be promissory liability when there has been a bargain, and, to the extent this is true, that the bargain is itself the basis of liability. But before acceding wholeheartedly to this reading, however, we should note two things: (1) that the court adopts this rule for specified, moral reasons; and (2) that the court has not in fact closed the door on the historical bases of liability.

The opinion states that this limitation is necessary in order to articulate a rule of law that is "clear, intelligible, and not difficult of application."[58] This basic public policy consideration is familiar to modern lawyers as a variation of constitutional due process. What is more interesting is that this rule itself involves a moral proposition. As Atiyah reminds us, the moral values of individual freedom and free choice behind the theory of economic liberalism are sufficiently recognized only when there are "regular" and "certain" rules of law that allow actors to "appraise their position and choose how to act for their own purposes."[59] Thus, the specified reason for the court's rejection of "moral obligation" as grounds for promissory liability is not a negative rejection of the historical basis of liability, but instead is a positive response to emerging moral understandings and public policy concerns.

Close reading of the opinion supports the argument that the court did not mean to overturn these historical bases of liability in favor of bargain. The court's rule allows that good consideration can arise "through the medium of an *implied* promise[,]"[60] leaving the door open for the court to find liability despite the absence of bargain. For instance, *Wiggins* forecloses the possibility that if *A* does something for *B* and *B* later promises to pay *A*, then *A* can recover damages *by arguing that B has an underlying moral obligation*. However, in this same situation, *A* remains able to recover from *B* by arguing that *B* had *impliedly* promised to pay *A*. That is, by arguing that *B* owed a *debt* to *A*.

The *Wiggins* court cites extensively to case law supporting the proposition that paternity (absent an order of filiation) does not constitute an implied promise to support an illegitimate child.[61] In doing so, the court demonstrates that it is quite aware of its retained power to find liability on a theory of implied promise. Second, by concentrating on the historical treatment of paternity suits, the court indicates that it remains both willing to find liability in other situations supported by precedent and responsive to the concern that arguments for liability based simply on "moral obligation" are too amorphous to serve the values of individual freedom and free choice.

As in *Boston*, the *Wiggins* court is more accurately characterized as coming to understand "bargain" as a way of articulating situations consistent with historical forms of liability and responsive to present public policy concerns and moral understandings than as itself a new basis of liability. Taken together, the opinions suggest that the court will be willing to find liability when the rule of liability thus generated is "clear,

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58. *Id.*

59. ATIYAH, *supra* note 11, at 114. This reading of the *Wiggins* opinion is supported by the court's statement that the more limited rule is particularly well-suited to "the business relations of life." *Wiggins*, 6 Ind. at 257.

60. *Wiggins*, 6 Ind. at 257 (emphasis added).

61. *Id.* at 256.

intelligible, and not difficult of application";[62] will not "encourage depredations on private property";[63] and is in accord with historical foundations of liability.

The role of bargain in this equation can be seen by looking at two cases supporting the proposition that "inadequacy of consideration will not vitiate an agreement."[64] In *Hardesty v. Smith*, [65] the plaintiff purchased from the defendant the rights to a mechanical improvement on lamps. Though the improvement turned out to have no commercial value, the court held that the contract was valid, stating that "[t]he consideration agreed upon may indefinitely exceed the value of the thing for which it is promised and still the bargain stand."[66]

The court is not saying, though, that the court must not examine the competing moral claims in a particular case. Instead, the court bases its rule on the belief that "[p]arties of sufficient mental capacity for the management of their own business[] have [the] right to make their own bargains."[67] Upholding bargains despite prima facie inequities is a way to privilege the moral value of individual autonomy.

Second, the *Hardesty* court is motivated by a fear that inquiry into the adequacy of consideration *in the context of a bargain* is a slippery slope that could undermine the stability of contracts. The court opines:

> [I]f a court or jury may annul the bargain if they come to the conclusion that the article sold was of no value, then they should be permitted in every case . . . to determine whether it is worth as much as has been promised for it, and, if it is not, to reduce the amount to be paid to that point; thus doing away with all special contract . . . .[68]

If the court is allowed to undo bargains based upon its own valuation, then there will be no clear rule of law capable of informing actions in the marketplace.

In *Schnell v. Nell*,[69] the court must decide whether consideration of one cent is sufficient to support a promise to pay $600 in three annual installments of $200 each. The defendant, Zacharias Schnell, executed a sealed instrument promising the annual payments "in consideration [of aid previously rendered to him by his deceased wife], and the love and respect he bears for her; and, furthermore, in consideration of one cent received by him of the second parties."[70] The court finds that previously rendered service by his wife is invalid as a "past consideration."[71] If there is sufficient consideration, it is the exchange of one cent for $600.[72]

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62. *Id.* at 257.
63. Boston v. Dodge, 1 Blackf. 19, 20 n.1 (Ind. 1818).
64. Schnell v. Nell, 17 Ind. 29, 31 (1861).
65. 3 Ind. 39, 40 (1851).
66. *Id.* at 41.
67. *Id.*
68. *Id.* at 42–43.
69. 17 Ind. 29 (1861).
70. *Id.* at 30.
71. Past consideration as a general grounds for promissory liability is foreclosed hy the *Wiggins* decision. *See supra* text accompanying notes 52–61. The *Schnell* court is presumably unwilling to find an implied promise to pay for matrimonial services.
72. *See Schnell*, 17 Ind. at 32.

The *Schnell* court allows that "as a general proposition, inadequacy of consideration will not vitiate an agreement."[73] However, though aware of the moral and public policy concerns raised in the *Hardesty* opinion, the *Schnell* court goes on to point out that these concerns are only implicated when the objects of exchange are of "indeterminate" as opposed to a "determinate" or fixed value.[74] In the case of a "mere exchange of sums of money," the doctrine of inadequacy of consideration does not apply.[75]

It is tempting to read *Schnell* as a strict bargain theory case arguing that the exchange of one cent for $600 is evidence that there is no real bargain and hence no liability. But such a reading ignores the purpose for which bargain is used by the court. Since *Schnell* has not received anything of value he is not under any obligation to pay the defendants. Yes, there is an absence of bargain, but there are also no facts that would support a finding of liability upon a benefit/detriment theory either. The absence of any debt trumps the value of individual autonomy. Further, the *Schnell* court need not fear a slippery slope because the objectivity of value of money allows the court to say that this is "an unconscionable contract, void, at first blush, upon its face, if it be regarded as an earnest one."[76]

The arguments above are not meant to discount the importance of bargain in nineteenth-century Indiana case law. Indeed, bargain emerges here as a powerful analytic tool respectful of the individual autonomy and free choice and responsive to public policy concerns, both the perceived utility of upholding contracts by their terms and of articulating clear rules for the creation of promissory liability. But this does not mean that the court has abandoned (or needs to) other bases of promissory liability. The decisions that articulate the basic principles of bargain theory also leave room for promissory liability consistent with historical bases of liability and responsive to the public policy concerns articulated by the court. As the next section shows, this insight can be used to explain two lines of cases in which the Indiana courts have continued to find promissory liability in the absence of bargained-for exchange.

III. TWO LINES OF CASES IN WHICH THE INDIANA COURTS HAVE NOT ADHERED TO A BARGAIN THEORY OF CONSIDERATION

The *First Restatement of Contracts* defines consideration solely in terms of bargain. Section 75 reads, "Consideration for a promise is an act . . . or forbearance . . . or [a change in] a legal relation, or a return promise *bargained for and given in exchange for the promise*."[77] Here, bargain is the substantive basis of liability. The Indiana Commentators do recognize that there is case law to the contrary and allow that "[a] promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by

73. *Id.* at 31.
74. *Id.*
75. *Id.*
76. *Id.*
77. RESTATEMENT (FIRST) OF CONTRACTS § 75 (1933) (emphasis added).

enforcement of the promise."[78] However, the language of section 90 indicates the Commentators' belief that such situations are exceptions to the general rule: remedies are limited and recovery depends upon a showing of actual damages.[79]

The case law itself, though, does not follow this strict bifurcation into proper contracts (those involving bargain) and promissory liability based on ill-defined appeals to justice. Rather, as our analysis of *Boston*, *Hardesty*, *Wiggins*, and *Schnell* indicates, Indiana courts have always been willing to find promissory liability when: (1) there is a moral obligation attendant upon the promise normally captured by analysis under the benefit/detriment theory; (2) a finding of liability is consistent with the articulation of a clear rule of easy application; (3) liability is respectful of formal individual freedom; and (4) there is general social utility to enforcing the promise. The court has recognized that bargain meets these criteria admirably, but has never been willing to fully embrace the idea that bargain is the *only* way to address these concerns. At the same time, the court has never "fallen off the wagon" so to speak, finding liability based upon idiosyncratic notions of justice. This section discusses two lines of Indiana cases in which the court has rejected bargain theory in favor of the more broad-based theory of liability outlined above.

A. Offers of Reward

An offer of reward is a general offer susceptible of acceptance by a party performing the requested act.[80] If *A* publicly proclaims the he will give $100 for the return of his lost watch and *B*, on the strength of that statement, searches for, finds, and returns the watch, then a bargained-for exchange has occurred and *A* is liable to *B* for the $100. However, what if *B* returns the watch without knowing that *A* had ever offered a reward for its return? In that case, *B*'s action was not induced by *A*'s offer, the exchange was not bargained for, and, under bargain theory, the consideration should fail. The Indiana Commentators support this analysis.[81]

Indiana courts, though, did not follow this rule. In *Dawkins v. Sappington*,[82] the defendant publicly offered a reward of $50 for the return of a stolen horse. The plaintiff did find and return the horse, but the court found that there had been "a performance of the service without the knowledge that the reward had been offered. The offer . . . did not induce the plaintiff to act."[83]

Acknowledging the "general rule" that a plaintiff must show that he was induced to act by the offer, the court found that since "the offer was a general promise to any person who would give the [performance] sought . . . [and] the plaintiff, having [performed the service sought], was within the terms of the offer, . . . the court [should] not go into the plaintiff's motives."[84] The rule generated is that liability upon a public

78. *Id.* at § 90; INDIANA RESTATEMENT, *supra* note 2, §§ 85, 90, at 32, 36 (affirming that the language of section 90 is supported by case law in Indiana).

79. *See* RESTATEMENT (FIRST) OF CONTRACTS § 75 (1933).

80. WILLISTON & THOMPSON, *supra* note 17, § 32, at 34–35.

81. *See* INDIANA RESTATEMENT, *supra* note 2, §§ 53, 85, at 59–60, 99.

82. 26 Ind. 199 (1866).

83. *Id.* at 200.

84. *Id.* at 201 (citing Williams v. Carwardine, 4 B. & Ad. 621, 110 Eng. Rep. 590 (K.B. 1833)).

offer of reward will be upheld, even when the defendant can demonstrate the absence of bargain.

According to the Indiana Commentators:

> [C]ases of the type of *Dawkins v. Sappington* . . . are other cases where there is no other consideration than the Will Theory, and if the courts in Indiana intended to make these cases a new category of contracts they would have to be named as other illustrations . . . of the Will Theory. But apparently the Indiana courts have had no such purpose in mind, and if they had any such purpose it would be difficult to see why they should require any other consideration for any kind of promises. What the Indiana courts did in reward cases was probably to blindly follow an old English case without adequate rationalization of the whole subject of consideration and agreement.[85]

Clearly the Commentators are correct that a simple expression of intent to be bound was not sufficient to support promissory liability by the middle of the nineteenth century. Zacharias Schnell shouted his intent from the rooftops but was not held liable. However, the Commentators are mistaken in asserting that *Dawkins* is supported only by a Will Theory. A much simpler explanation is that the court had no reason *not* to find liability.

First, the *Dawkins* court asks itself, "Would the benefit to [the defendant] be diminished by the discovery that the plaintiff, instead of acting from mercenary motives, had been impelled solely by a desire to prevent the larceny from being profitable to the person who had committed it?"[86] Since the defendant has received a concrete benefit, the court feels comfortable finding that a debt has been created and that the defendant *ought* to pay.

Second, a finding of liability when there has been a public offer of reward results in a clear rule of easy application. When *A* makes a public offer of reward he is strictly liable to *B* upon performance of the terms of the reward. *A* knows that he is liable under this rule and *B* "may know that by [acting for the public good] he not only performs a virtuous service, but also entitles himself to whatever reward has been offered therefor [sic] to the public[.]"[87]

Third, the individual freedoms the court is concerned with in *Hardesty*[88] and *Wiggins*[89] are not implicated in the context of offers of reward. The court is not unmaking a bargain such that the actor is deprived of the ability to order his own affairs nor is the law allowing appeal to broad notions of morality such that the actor is unsure what bargains will and will not be upheld. *A* remains free to make or not make the offer and *B* knows that he can recover if such an offer has been made.

Fourth, the *Dawkins* court is clear that the balance of public policy considerations favors a finding of liability. Justice Ray cites "considerations of morality and public

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85. INDIANA RESTATEMENT, *supra* note 2, § 85, at 34.
86. *Dawkins*, 26 Ind. at 201.
87. *Id.*
88. 3 Ind. 39 (1851).
89. 6 Ind. 252 (1855).

policy which strongly tend to support the judgment."[90] The plaintiff has received a concrete benefit for which he asked, and the *Dawkins* rule promotes crime prevention. "Is it not well that any one who has an opportunity to prevent the success of a crime, may know that by doing so he . . . entitles himself to whatever reward has been offered . . . ?"[91]

Promissory liability, for the *Dawkins* court, is not based in bargain, or the Will Theory, or any other singular principle. Instead, the court engaged in a multifaceted analysis based in concepts of duty and moral obligation that is responsive both to changing nineteenth-century moral understandings and the practical effects of finding liability.

Importantly, the Indiana court continued to maintain that recovery in offer of reward cases is recovery in Contract. In *Sullivan v. Phillips*,[92] an early twentieth-century case in which the plaintiff had no knowledge of the offered reward, the court examines the rules related to offers of reward in light of the rules relating to offers generally. Such offers can be limited in time and place;[93] they can be revoked prior to "acceptance";[94] and recovery can be had for the amount of the reward without a showing of any costs incurred by the plaintiff.[95] This mode of analysis indicates the court's understanding that looking for bargain is a powerful analytic tool for discerning the conditions of promissory liability. However, adherence to the *Dawkins* rule itself indicates that the court did not see bargain as itself the basis of liability.

There is no reason to classify these cases under the vague "injustice" theory articulated in section 90 of the *First Restatement* or to dismiss them as illegitimate or anomalous. The *Dawkins* rule can be seen as reinterpretation of the benefit/detriment theory according to public policy concerns and new moral understandings. As sucb, it can properly be considered a rule of Contract and should be maintained absent a showing that the court is incorrect as to the balance of public policy considerations.

B. Charitable Subscriptions

In *Johnson v. The Wabash College*,[96] the defendant executed a note to the college stating, "For value received I promise to pay . . . fifty dollars five years from [today], with interest payable annually."[97] In sustaining the plaintiff's demurrer to defendant's claim that there was no consideration, the court said simply that "[t]he accomplishment of the object in aid of which the money was promised formed a good and valid consideration for the promise to pay it."[98]

Williston is quite explicit that this situation does not amount to a bargain. "It is doubtless true that the charity to which subscription is made . . . impliedly promise[s] to apply the funds in accordance with the terms of the subscription. But this promise is

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90. *Dawkins*, 26 Ind. at 201.
91. *Id.*
92. 98 N.E. 868 (Ind. 1912).
93. *Id.* at 869.
94. *Id.*
95. *See id.*
96. 2 Ind. 555 (1851).
97. *Id.* at 555.
98. *Id.*

not made as the consideration or exchange for the subscriber's promise."[99] For the *Wabash* court, however, this is not the point. The consideration is not bargained-for exchange, but the intrinsic good of the charitable work.[100]

The Indiana Commentators argue that *Wabash College* and other charitable subscription cases are in fact "illustrations of what in the early law of informal contracts would have been called injurious reliance, but which are now called promissory estoppel."[101] As such, they would fall under the special exceptions outlined in section 90 of the *First Restatement of Contracts*.[102] But if detrimental reliance is the theory behind promissory liability in these cases, why didn't the Indiana courts just say so? In fact, the court was quite clear that detrimental reliance was not necessary for recovery in charitable subscription cases.

Barnett v. Franklin College[103] involved an "endowment bond" in which the defendant's decedent stipulated that the estate pay the sum of $5000 to be used for the "capital stock" of the institution. The plaintiff's counsel did feel it necessary to argue that there was sufficient consideration for the bond in that "on the faith of these and other bonds the [college] expended money and incurred obligations in anticipation that the bonds would be paid."[104] However, this argument was not the basis of the court's holding. Citing *Roche v. Roanoke Classical Seminary*[105] (another charitable subscription case), the *Barnett* court stated "[in *Roche*] the supreme court expressly held that the instrument required no further consideration to support it than 'the accomplishment of the object in aid of which the money was promised,' which, in that case, as in this, was to go to the endowment fund of an institution of learning."[106] Later, in *Woodworth v. Veitch*,[107] the Indiana court made clear that in cases of charitable subscription "[a] promissory note is presumed to have been given upon a sufficient consideration."[108] In all of these cases, the plaintiff need make no showing that there has actually been detrimental reliance, and recovery is not limited to the extent of reliance.

The Indiana Commentators charge that in *Wabash*, *Roche*, *Barnett*, and other cases upholding promissory liability for charitable subscriptions, the court is attempting to "rationalize these cases as cases of consideration[,]"[109] and there is some truth to their assertion. They can point to statements like that of the *Barnett* court: "The principle upon which [charitable subscriptions] are held to be valid is the reciprocal undertaking on the part of the promisor to pay and the promisee to perform something of value to

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99. WILLISTON & THOMPSON, *supra* note 17, § 116, at 165.

100. *See Johnson*, 2 Ind. at 555.

101. *Id.* § 85, at 33.

102. RESTATEMENT (FIRST) OF CONTRACTS (1932) § 90, at 36 (stating that recovery can be had based on detrimental reliance when "injustice can only be avoided by enforcement of the promise").

103. 37 N.E. 427 (Ind. App. 1893).

104. *Id.* at 428.

105. 56 Ind. 198 (1877).

106. *Barnett*, 37 N.E. at 429. *But see* Peirce v. Ruley, 5 Ind. 69 (1854).

107. 29 Ind. App. 589 (1902).

108. *Id.* at 589.

109. INDIANA RESTATEMENT, *supra* note 2, § 85, at 34.

the promisor, though the value may only be of indirect benefit to the latter."[110] But we should note that a court's failure to clearly articulate the principles behind its decision does not necessarily mean that the decision itself is illegitimate. After all, the purpose of the *Restatement* is to clarify the principles of promissory liability.

While it is true that finding promissory liability in the reciprocal obligations of the parties is a neat bit of circular reasoning, it does not follow that these cases were incorrectly decided, or that they can only be grounded in a theory of detrimental reliance. As in offers of reward, the charitable subscription cases meet the four criteria necessary for a finding of promissory liability: (1) There is a moral obligation attendant upon a promise to give to charity; (2) the rule (that you have to pay on promises to support a public charity) is clear and of easy application; (3) the defendant's personal autonomy is not implicated since there is no bargain that the court is unmaking; and (4) the goals of a charitable institution, almost by definition, advance the public good.

Attempts to rationalize these decisions as cases of detrimental reliance can be seen as attempts to identify the moral obligation attendant upon a promise to a charity within the field of promises for which there is a clear basis for enforceability. Concurrent attempts to understand these transactions as implicit bargains reflect much the same goal. However, neither strategy is necessary if one accepts the broad based notion of promissory liability outlined in this Note. The enforcement of charitable subscriptions is consistent with the historical bases of promissory liability informed by nineteenth-century moral and public policy concerns. That is, and should be, enough to ground promissory liability.

CONCLUSION

The bargain theory is attractive, as is any singular theory of contractual liability, because it appeals to our desire for clear-cut rules that can be easily applied. Often, however, this desire can only be satisfied if we are willing to sacrifice our common-sense moral notions. The case law suggests that the Indiana courts have always been aware of this tension. The development of contractual liability in Indiana has not been a progressive march toward a singular rule, but a continual process in which the court tries to balance the need for order against the desire to vindicate our moral concerns.

While bargain is a powerful analytic tool, the Indiana courts have continually balked at making bargain itself the basis of liability. Instead, they have continued to find liability when the rule thus generated is responsive to the court's historical, moral, and public policy concerns. Willingness to ground promissory liability in such moral considerations is far from the "death of contract." It is merely a continuation of what has been going on all along.

This Note has outlined a broad-based theory of promissory liability that accounts for the variety of situations in which promissory liability has been upheld. This Note is not meant to argue that this is the "correct" theory, but hopefully it demonstrates that a more broad-based, inclusive theory of contractual liability is at least coherent and possible. Understanding is better served by engaging the complexities of reality than by attempting to dismiss irregularities. In Contract, the reality is perhaps not even all that complex.

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110. *Barnett*, 37 N.E. at 429.