I. INTRODUCTION

Although the conventional view of the American moral obligation principle recognizes as binding only promises to pay for past benefits, the principle has been applied more broadly to encompass promises made to atone for past harms caused in relationships where cooperation and good faith were reasonably expected. When this writer was doing research for a recent article documenting how the moral obligation principle includes benefits flowing to parties other than promisors, he unearthed moral obligation decisions rendered over the past two centuries which were not grounded upon receipt of benefits at all, but rather involved promises to indemnify for promisors’ wrongs or for promisees’ harm suffered on account of promisors. That discovery prompted the undertaking of this study to document the evolution and scope of this overlooked sub-category of the moral obligation principle.

A moral obligation promise to compensate for a past, non-tortious wrong falls short of what is necessary to bring an action in either restitution or tort, and the

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1. See RESTATEMENT (SECOND) OF CONTRACTS § 86 (1) (1981) (stating that “[a] promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.”).

abundance of a bargain makes it unenforceable under contract law.\textsuperscript{3} While the doctrine of restitution may include a wrong that has nothing to do with unjust enrichment, the wrong must nevertheless be tortious.\textsuperscript{4} Judicial enforcement of a promise acknowledging a moral obligation to indemnify prevents the injustice of such an obligation otherwise falling through the cracks among the fields of restitution, tort, and contract. When the wrong committed is conduct short of breach of tort, contract, or fiduciary duties, a subsequent moral obligation promise may make the difference. Courts will look to the egregiousness of the wrong or harm as a means of screening whether a binding moral obligation promise existed.\textsuperscript{5}

Certain of the judicial applications of the moral obligation principle covered below have either not been addressed or are not supported by a majority of jurisdictions. The moral obligation ideas drawn from the developing case law are presented here in a manner similar to the treatment of the conventional moral obligation principle enunciated in the Restatement Second of Contracts.\textsuperscript{6} The intention is not to state the principle in terms of majority and minority positions, but rather to set out the structure and usage of a sub-category of the moral obligation principle from which modern fused courts of law and equity draw in order to realize just results consistent with consent and conventional community expectations.\textsuperscript{7} A few commentators have vaguely noted that courts have appeared to enforce restitutionary promises to indemnify the victim of a wrong committed or harm suffered in the absence of promisor’s receipt of unjust enrichment.\textsuperscript{8} While such commentary has

\begin{itemize}
\item \textbf{3.} See Warren A. Seavey & Austin W. Scott, \textit{Restitution}, 54 L. Q. Rev. 29, 30-35 (1938).
\item \textbf{4.} See \textit{RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS} §§ 2, 3, 40, 97, 128 (1937); Daniel Friedmann, \textit{Restitution for Wrongs: The Basis of Liability, in RESTITUTION: PAST, PRESENT & FUTURE} 133-34 (W.R. Cornish et al. eds., 1998) (emphasizing that commission of tort is \textit{sine qua non} to restitution); James J. Edelman, \textit{Unjust Enrichment, Restitution and Wrongs}, 79 Tex. L. Rev. 1869, 1869 (2001) (agreeing that restitution may be rewarded for a wrong and that the award may have nothing to do with unjust enrichment); Seavey & Scott, supra note 3, at 30-35; see also 1A ARTHUR LINTON CORBIN, \textit{CORBIN ON CONTRACTS} § 221 (1963) (observing that tort barred by statute of limitations not revived by waiver but promise to make restitution of unjust enrichment caused by a tort, now barred, would be enforced).
\item \textbf{5.} See Trueman v. Fenton, 98 Eng. Rep. 1232, 1234 (K.B. 1777) (explaining that Mansfield bothered by gross dishonesty of defendant buying large quantity of linen from plaintiff “on eve of bankruptcy”); 4 SAMUEL WILLISTON, \textit{WILLISTON ON CONTRACTS} § 8.12 (Richard A. Lord rev., 4th ed. 1992) (admitting that minority position’s liberality applied especially to “egregious settings”); Charles M. Thatcher, \textit{Complementary Promises for Benefits Received: An Illustrated Supplement to Restatement (Second) of Contracts Section 86}, 45 S.D. L. Rev. 241, 276-77, 280, 281 (2000). In some instances, an actual breach of a legal duty may have occurred, but an action might not have been brought because of a friendship or when a breach may not have been discovered had it not been for the admission of the breach in the moral obligation promise.
\item \textbf{6.} \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 86 (1981).
hinted at this application of the moral obligation principle, few specific case law examples have been cited and no organized development of this category has heretofore been made. The present study fills that void by providing a structured look at the case law support for this application of the moral obligation principle.

In searching for the genesis of a moral obligation category for wrongs committed or harm caused, the earliest instances seem to be eighteenth century English decisions for recovery on promises made to atone for harm caused by past cohabitation.\(^9\) Starting in the nineteenth century, American decisions broadened the application to other factual circumstances of a felt, moral obligation engendered by promisor’s wrong, by promisee’s injury suffered on account of the promisor, or when there existed a combination of promisee’s obvious injury and some minor indication of promisor’s unjust enrichment.\(^10\) These promises are frequently held binding in situations where voluntary relations of trust exist and a moral obligation would naturally be felt if bad faith actions caused harm to the more vulnerable party in the relationship.\(^11\)

Although the Restatement Second moral obligation principle stated in Section 86 focuses solely on the unjust enrichment element, illustrations seven and eight to Section 86 involve harm to the promisee without any reference to a benefit received by the promisor.\(^12\) Just as a long line of moral obligation cases exists in support of actionability of promises for receipt of a past benefit, a secondary strain exists for promises to indemnify for wrongs and harm directly or indirectly connected to the promisor.\(^13\) The moral obligation principle has had an ameliorative effect on the periphery of both the benefit and detriment sides of past consideration. Due to the predominant influence of the limited material benefit line of moral obligation cases recognized by common law commentators in the early nineteenth century,\(^14\) relief on restitutionary promises to provide an indemnity were sometimes disguised in judicial opinions as cases of promisors’ receipt of a material benefit.\(^15\)


\(^10\) See cases cited infra notes 86 & 87.

\(^11\) Id.

\(^12\) RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. a, illus. 7 & 8 (1981).

\(^13\) See cases cited infra notes 14 & 15.


Plaintiff’s actions on subsequent promises to indemnify have been aided by the fact that courts usually focus more on the moral obligation promise itself than on the reason for the promise, whether the motivation be due to unjust enrichment or to indemnify. Others point out that recovery under either pure restitution or moral obligation frequently has little to do with unjust enrichment. In some cases below, the promisor may have received an incidental benefit, not necessarily from the promisee, but the moral obligation to atone for a wrong or harm caused was still the primary factor animating the promise.

This study encompasses subsequent promises to indemnify or atone for wrongs or harm caused by promisors while engaged in voluntary relations with promisees in contractual, fiduciary, reliance-based or cohabitational contexts or for harm suffered in the *sui generis* instance of a heroic rescue. The environment surrounding such voluntary relations raises reasonable expectations of reciprocity and cooperation. If one party takes advantage of the other in such an environment of trust, a moral obligation may arise to promise recompense for the harm. Community expectations in the form of judicial opinions often support enforcement of that obligation. This study is organized into the following categories: I. Harm Caused During Stages of Life of Contract; II. Reliance Hardship Motivating Subsequent Promise; III. Harm Suffered by Past Cohabitation; IV. Injury Suffered by Rescuer.

II. HARM CAUSED DURING STAGES OF LIFE OF CONTRACT

Defendant’s promises on moral obligations generated by harm caused during one of the three stages of the life of a contract have been found binding when the circumstances would result in an injustice if the defense of the lack of a bargain were to prevail. This category concerns obligations beyond those that may exist if bad

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17. See Edelman, *supra* note 4, at 1869 (stating that restitution may be awarded for a wrong in the absence of unjust enrichment); cf. 1 GEORGE E. PALMER, THE LAW OF RESTITUTION §§ 2.1, 2.10 (1978) (noting that generally harm must cause unjust enrichment though sometimes the enrichment is not so obvious).

18. Under the conventional moral obligation principle, the benefit must flow from the promisee to the promisor. *See Restatement (Second) of Contracts* § 86 (1) (1981); but cf. Teeven, *supra* note 2, at 728-50 (setting out case law in support of binding moral obligation promise for benefit to person other than promisor).

19. See, e.g., cases cited *infra* notes 21, 24, & 42.
faith contracting happened, but only when a subsequent moral obligation promise is given. For example, when a contract is formed, contractors drop their former arms-length relationship and reasonably expect cooperation from fellow contractors to whom they are now vulnerable if untoward behavior occurs. Courts will enforce a promise made by a party who acts in bad faith toward a fellow contractor who has the right to expect cooperation. This section looks at case law involving: (A) Harm Caused in Process of Contract Formation; (B) Harm Suffered During Performance of Contract and Fiduciary Duties; (C) Contract Enforcement Harm Caused by an Unfair Judgment.

A. Harm Caused in Process of Contract Formation

Courts have applied the moral obligation principle to indemnify for harm suffered due to inappropriate behavior during relations leading up to and including the contract formation phase. In a 1777 bankruptcy waiver precedent, Mansfield, C.J., found relevant the egregious behavior of the defendant in inducement of contract formation while in very shaky financial circumstances. The promisor's moral obligation to pay his debt to plaintiff was reinforced by his fraud or gross dishonesty in inducing plaintiff to accept two promissory notes in exchange for the sale to defendant of a large quantity of linen "at the eve of his bankruptcy." The plaintiff prevailed on the subsequent agreement waiving bankruptcy.

Over a century later in Hurst v. Mutual Reserve Fund Life Ass'n, fraud was found due to the deceased defendant's misrepresentation of his firm's financial condition to induce the plaintiff to commit his firm to make a loan to decedent's firm. When the deceased's firm subsequently went insolvent, plaintiff reimbursed his own firm for implicating them in the bad debt. The defendant recognized his moral obligation to plaintiff and promised to reimburse the plaintiff for his personal loss caused by deceased's "dereliction." The court cited Mansfield's Hawkes v. Saunders decision in support of the conclusion that the promisor's wrong had placed him under a moral obligation to the plaintiff for the harm caused, that his promise was binding "to give indemnity to friends" who assisted him, were vulnerable to his intentions, and whom "he at the

20. Id.
22. Id. at 1232.
23. Id. at 1234.
24. 26 A. 956, 958-59 (Md. 1893).
25. Id.
26. Id. at 959 (involving reimbursement by decedent assigning his life insurance to plaintiff).
27. Id. at 958-59; Hawkes v. Saunders, 98 Eng. Rep. 1091 (K.B. 1782) (stating that "[W]here a man is under a moral obligation, which no Court of Law or Equity can enforce, and promises, the honesty and rectitude of the thing is a consideration.").
same time had deceived. This binding promise was not in settlement of a tort action of deceit nor was it for a benefit received by the promisor individually. Rather the promise was grounded upon a moral obligation generated by the promisor's wrongful inducement of a loan which thereby caused harm to the trusting plaintiff.

Restatement Second of Contracts Section 86 employed the facts of the 1922 Virginia decision Haynes Chem. Corp. v. Staples & Staples, Inc., in an illustration of a binding moral obligation promise made on account of harm caused by promisor's bad faith. The parties' understanding had been that during a phase prior to possible adoption of plaintiff's advertising proposal, the plaintiff advertising firm expected payment only if defendant accepted its plan. The court found an understanding that the defendant firm would make "a decision in good faith" regarding the "merits of the plan." However, the defendant failed to give the plan serious consideration, much less than its promised "heartiest consideration" when it decided to use an in-state advertising agent instead. The defendant had not realized any benefit from the plaintiff's proposal; still, the defendant's representative recognized the wrong and said, "It looks like you got the rough end of the poker . . . your work was fine; and we feel you ought to be recompensated." The defendant's promise to pay plaintiff's expenses was found to be an enforceable acknowledgment of a moral obligation to pay for harm caused by bad faith. Good faith negotiations are generally not prescribed in contract law, but when the moral obligation was raised by the firm's bad faith during the formation process, the subsequent promise to indemnify for the harm was in fairness held to be binding.

B. Harm Suffered During Performance of Contract and Fiduciary Duties

During the performance of contractual and fiduciary duties, injuries caused by unfolding events, such as unforeseen circumstances and wrongs committed, can raise a sense of moral obligation to cooperate by making adjustments to the parties' relations in order to alleviate the harm. This section investigates these possibilities in the context of adjustments of contract duties and poor performance of fiduciary duties.

28. Id. at 957.
31. Id.
32. Id. at 804-05 (stating that "heartiest consideration" meant nothing less than "full and fair consideration" and that, not only had the defendant not done it, but that it also had not given plaintiff the opportunity to present the plan to the board of directors.).
33. Id. at 804.
34. Id. at 805.
1. Performance of Contract Duties

Attempts to modify the terms of contractual relations must contend with the bar presented by the preexisting duty rule. Although the preexisting duty rule has been significantly liberalized over the past century, restaters' comments to *Restatement Second of Contracts* Section 86 reject the proposition that an unequal contract exchange could constitute unjust enrichment to support a moral obligation promise. Had the moral obligation principle not been narrowed in the mid-nineteenth century, more flexible rules would accommodate contract modifications today. The restaters did, however, recognize a moral obligation exception where an unequal exchange was caused by unanticipated circumstances. In *United States v. Cook*, Taft, C.J., ruled binding the government's agreement to increase in compensation to a contractor due to the burdens generated by the San Francisco earthquake. Taft concluded there was a "moral consideration" which made for a binding obligation on the government. Courts commonly employ the natural law terminology "moral consideration" as a means of awkwardly masquerading moral obligation as a form of the mainline doctrine of consideration. Moral consideration, or moral obligation, was another way of saying what a Minnesota court had articulated a generation earlier in the landmark unanticipated circumstances decision *King v. Duluth, M & N Ry. Co.* The Minnesota court employed notions of fairness and the consensual theory to declare that the modification was binding because "unforeseen and substantial difficulties in the performance . . . cast upon him an additional burden not contemplated by the parties." One unanticipated circumstance, which falls outside the reach of the preexisting duty rule, is the case of a third party's receipt of a benefit that emanated from the performance of a contract. The restaters took the position that

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41. 257 U.S. 523, 528 (1922).
42. *Id.* at 527 ("There was the moral consideration which properly induced the recognition of an honorable obligation and turned an unenforceable equity into a binding and effective provision.").
43. See *id*.
44. 63 N.W. 1105 (Minn. 1895).
45. *Id.* at 1107; accord Linz v. Schuck, 67 A. 286, 288 (Md. 1907) (involving construction contract disrupted by unforeseen soil conditions); see also Meech v. City of Buffalo, 29 N.Y. 198, 210 (1864).
no moral obligation was present because the third party did not receive an unjust enrichment. But in 1909, a Kansas court came to a contrary conclusion in *Pittsburg Vitrified Paving & Bldg. Brick Co. v. Cerebus Oil Co.* As a natural consequence of the plaintiff exercising his right to drill for oil, a gas well was produced, thereby benefiting the defendant landowner, with whom the plaintiff was not in privity due to a string of assignments. \(^4\) The Kansas court enforced the defendant's subsequent promise to pay the plaintiff's costs to avert the unjust enrichment which would otherwise have occurred. \(^49\)

The moral obligation principle has been applied to adjustments to bargains made unequal by wrongs and mistakes committed during performance of contracts. In the 1889 Georgia decision *Gray v. Hamil*, a partner rendered himself unable to perform his share of partnership duties due to his "excessive use of stimulants." \(^5\) This partner recognized his wrong and so promised to "equalize" the "difference resulting from the failure of one to do his part." \(^51\) The Georgia court held that consideration was present since the agreement was "supported by a strong moral obligation." \(^52\) In the absence of the moral obligation principle, the court observed that partnership law would not have provided relief to the wronged partner who shouldered the extra burden. \(^53\) The partnership relationship does however include fiduciary duties, with each partner vulnerable to lack of diligence on the part of the other partner. The moral obligation principle has also been applied to cases of mistakes made in conveyancing property pursuant to contract. In *Cardwells Adm'rs v. Strother*, a Kentucky court said that if a deed of conveyance imposed less obligation than was intended, the party "was certainly under a moral obligation to correct the mistake, and that moral obligation is, in itself, sufficient to support the subsequent agreement to do what the parties originally intended should be done." \(^54\) At first glance, this Kentucky

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46. See *Restatement (Second) of Contracts* § 86 cmt. f (1981).
47. 100 P. 631 (Kan. 1909).
48. *Id.* at 632.
49. *Id.* at 633 ("There was ample consideration for such a contract, and sufficient evidence to support a finding that such a contract was made subsequent to the completion of the well." The unjust enrichment to landowner was the spin-off of gas which accrued to landowner's benefit as a result of plaintiff's drilling for oil.).
50. 10 S.E. 205 (Ga. 1889).
51. *Id.*
52. *Id.* One proviso here, Georgia is a code state more sympathetic to natural law ideas than a majority of states.
53. *Id.*
54. 16 Ky. (1 Litt. Sel. Cas.) 429, 432 (1821); accord *Spear v. Griffith*, 86 Ill. 552, 556 (1877) (stating that the mistake in the conveyance "created" a moral obligation "vendor recognized in his life, and in consideration thereof promised" to pay compensation); see also *Turlington v. Slaughter*, 54 Ala. 195 (1875) (involving promise to repay excess amount of judgment due to mistake).
decision appeared to contradict the New York decision Smith v. Ware, rendered five years earlier, but a closer look shows they are compatible. In Smith, the conveyance turned out to be five acres less than the ninety-three acres the deed was supposed to contain. The New York court cited the restrictive view of moral obligation depicted in the 1802 reporters' note to Wennall v. Adney as authority for its ruling that a subsequent promise to make up the deficiency lacked consideration. What makes the New York case distinguishable from the Kentucky decision is the fact that the acreage stated in the original contract in the New York case was merely an estimate of what was "supposed to" be conveyed and not a firm amount contracted for as in the Kentucky case.

Adjustments of employment relations present a fact-specific category of contract modification to consider under the moral obligation principle. Improvements in employees' contract benefits based on past unfairness raise a policy-charged challenge to the preexisting duty rule. After familial relationships and intimate friendships, employment relations comprise the most common long-term association that generates moral obligation promises, and employment is a relationship consisting of an amalgam of fiduciary duties grounded upon trust and cooperation. Probably the most regularly litigated promise has been the employer's promise motivated by a felt, moral obligation to recompense a poorly paid employee for loyal and long-time service, usually in the form of a bonus or a pension. Enrichment to the employer might arguably seem present, but because of the risk-allocation aspects of the preexisting duty rule, the benefit is not unjust; however, recovery is sometimes given when there is a sense that the employee was treated unfairly under the contract over the long term. While the common law often finds prohibited past consideration here, French laws have long enforced these promises. Whereas most American courts will refuse employers' promises to make amends for insufficient remuneration

56. Id. at 558-59.
57. Id. (claiming that moral obligation cases “admirably summed up in the note” to Wennall case). The reporters in Wennall claimed that precedents had not enforced moral obligation promises beyond the facts of revival of a prior binding obligation, as in the case of a waiver of statute of limitations. Wennall v. Adney, 127 Eng. Rep. 137, 138 n.a. (C.P. 1802).
58. Smith, 15 Johns. at 259 (underlining that the language “supposed to” meant that no specific quantity of land was contracted for).
60. Id. at 1174-76. Past consideration rule is tested here because no gift or officiousness. See id. at 1173.
during long and faithful service, a civilian jurisdiction such as Louisiana will often enforce such a promise as a fulfillment of a "natural obligation." The more civilian-inclined jurisdictions in the United States provide guidance for how a broader moral obligation principle can be implemented. Consideration will occasionally be found in support of an employer's promise of a bonus, either in the slight possibility of a future benefit to the employer or the detriment of a harm suffered by the employee. Take the case of a plaintiff who began employment with a firm as a clerk in 1912 and rose to chairman of the board before retirement in 1961. In light of his past services and the understanding that he would be available for consultation in retirement, the firm promised him a life annuity. The court acknowledged the past consideration, but latched onto the slender reed of possible future consultancy and reminded the defendant of the adequacy rule to hold the promise binding.

Some decisions make a liberal construction of consideration when a moral obligation is raised due to unfairness or mistreatment of an employee. In a 1944 West Virginia decision, a company agent misrepresented to an employee that no more workers' compensation was available. Although the court said the employee should have known the employer had no control over this matter, this harm contributed to tipping the balance for enforcement of a promise of disability benefits.

A few jurisdictions, which are more inclined toward equitable or civilian solutions, have treated particularly extreme exchange imbalances as an equitable ground for finding good consideration to support employers' remedial promises. In 1940, the Wisconsin court in In re Schoenkerman's Estate ruled binding a widower's promise of bonuses to his sister-in-law and mother-in-law in order to make up for the mere room and board he had provided them in exchange for their care of his young children for ten years. The court declared, "[a]s a moral obligation existed to pay

62. See, e.g., Plowman v. Indian Ref. Co., 20 F. Supp. 1, 5 (E. D. Ill. 1937) (ruling that past faithful service was not prior legal obligation to support moral obligation); Loan Ass'n v. Stonemetz, 29 Pa. 534 (1858).
64. Osborne v. Locke Steel Chain Co., 218 A.2d 526, 531 (Conn. 1966).
65. Id. at 528-29.
66. Id. at 528.
67. Id. at 532. In enforcing such promises, some courts have strained to find at least some part of benefits will not come to promisor until the future, even when promisor's motivation related to past relations with employee. See Meginnes v. McChesney, 160 N.W. 50, 54, 56 (Iowa 1916) (indicating the fact that promisor wanted to make up for underpaying his nurse in the past was not sufficient, but his inducement to keep her on the job would be).
69. Id. at 883. Despite the fact promissory estoppel was unavailable as to workers' compensation because of unreasonable reliance, consideration was provided for subsequent promise by employee's continuation of work in reliance on employer's custom of providing disability benefits.
70. 294 N.W. 810, 810-11 (Wis. 1940).
for the great excess of value of the services received by the decedent over the value of
the board and lodging received from the decedent by the claimants, that moral
obligation will be presumed to be consideration for the notes. In *Earl v. Peck*, a
physician had paid his housekeeper of eight years on an ambiguous and inconsistent
basis, so on his deathbed he added a $10,000 note to what he had previously paid her
for services rendered. The 1876 New York decision enforced the note while
acknowledging that the payment was probably in excess of the value of services
rendered. Louisiana employed a civilian solution in the case of a single man, who
"being without family, and believing that plaintiff had served him long and faithfully
at very small wage, felt that he was under a moral obligation to remunerate him
beyond his wages." The Louisiana court said the fulfillment of a "natural
obligation" was "good and valid consideration" for a promissory note.

Binding moral obligations have also been found in employees' reliance and
resulting harm which employers subsequently promised to recompense. For
example, an employee's loss might be suffered in reliance on a prior understanding
that a bonus, pension or other benefit would be provided. The prior understanding
relied upon is insufficient to act as a promise qualifying for promissory estoppel; so a
subsequent promise is needed to create liability under moral obligation. Thus, when
an employee was found to have continued to work for an employer in reliance on the
employer's custom of providing disability benefits, the court in *Grady v. Appalachian
Electric Power Co.* said the reliance provided consideration for the employer's
subsequent promise to pay disability benefits after the employee's injury. The past
reliance could not act as consideration for the subsequent promise since the reliance
was not part of the bargain. The Court explained that a liberal view of consideration
would be taken when the subsequent promise concerned a worker's injuries, rather
than more appropriately invoking the moral obligation principle in support of the
promise to indemnify for the reliance harm.

An 1895 Pennsylvania opinion was only a bit more forthright in saying that a
moral obligation had been raised when a school principal worked in reliance on her
right to employment created by a sectional school board election. The school board
later ruled that her election lacked legitimacy and terminated her position, but the city

71. *Id.* at 811-12 (pointing out that "it does not follow that there must have been a legal
obligation to compensate in order to constitute a moral obligation a good consideration").
72. 64 N.Y. 596, 597-98 (1876).
73. *Id.* at 599; see *Worth v. Case*, 42 N.Y. 362, 363, 370 (1870) (enforcing brother's large
note to his sister for nursing him through a four week illness and for other services she provided on
his periodic visits to her home over the years).
75. *Id.; see also Root v. Strang*, 28 N.Y.S. 273, 273-74 (1894) (holding note binding to
uncle for the note's stated long-continued services).
76. 29 S.E.2d 878, 879, 883 (W.Va. 1944).
77. *Id.* at 883.
council subsequently voted to cover her unpaid salary. The moral obligation promise was made, "in conscience" and "natural justice," on account of her reliance in working under color of title and right. The judicial opinion reinforced the city's moral obligation traditionally, through manipulation of the facts; fitting them under the construct of the influential reporters' note to the 1802 English decision Wennall, which restricted moral obligation to waivers and ratifications of prior contract obligations.

2. Performance of Fiduciary Duties

Actions have been successfully pursued to enforce a fiduciary's promise to atone for loss because of failure to properly perform duties owed to wards, principals, and others in relationships of trust and confidence. The motivation for the fiduciary's promise typically flows from a perceived moral responsibility for having acted improperly to the detriment of the ward. The wrong committed may or may not rise to the level of actionable negligence or misfeasance; but, in any event, the impropriety may not be discovered if not for the disclosure by the promisor. Some of the decisions have stretched for authority by claiming their rulings fell within the ambit of either the Wennall reporters' note or more likely the conventional view of the moral obligation principle. Other courts have not strained to find precedents but have simply declared that the moral obligation supplied sufficient consideration. Whichever justification is used, the leadership in this area has tended to emanate from decisions of state courts located in the Southeastern part of the country; the following discussion looks at four judicial opinions from that region.

The 1836 Tennessee decision Scott v. Carruth suggested that it was consistent with the Wennall reporters' note without giving an explanation. Here, the guardian

79. Id.
80. Id. (suggesting her reliance in continuing to work was reasonable since she operated under color of her election by the sectional board).
81. Id. at 926-27 (asserting that her right under the sectional election would have been enforceable in law had it not been for the positive bar announced by the higher school board); Wennall v. Adney, 137 Eng. Rep. 137, 138-40 n.a (C.P. 1802) (relegating moral obligation principle solely to revival of prior obligations in cases of statute of limitations waiver and adult ratification of contract made during minority).
83. See Slayton, 315 So.2d at 589; Brown, 18 S.E. at 421-22; Hyman, 72 So. at 954; Scott, 17 Tenn. at 419-20.
84. See Slayton, 315 So.2d at 509; Scott, 17 Tenn. at 420.
85. 3 HOLMES, supra note 8, § 9.30.
86. See generally Hyman, 72 So. at 954; Brown, 18 S.E. at 422.
87. 17 Tenn. at 420. Eleven years before this case was decided, the influential Mills v. Wyman decision had severely restricted the scope of the moral obligation principle. 20 Mass. (3
gave his former ward a promissory note to cover the loss of nine years of rental income resulting from the guardian's failure to collect rents for a third party's use of the ward's personal property. When later sued on the note, the guardian argued that the former ward still had time to sue the renter of the property. The court responded that it would be "subversive to the purpose of guardianship and the rights of ward[s]" for this burden to be left to the former ward, considering that the debtor might then be insolvent or have disappeared. The court said the guardian's note was binding even "if the legal liability of the defendant to the plaintiff, before giving the note were doubtful." The court continued that if the guardian felt wanting in the performance of his duties, then "feeling thus, and believing as well he might, that he was placed under a moral obligation to give the note in question, this will constitute a sufficient consideration to sustain an express promise." Despite the Tennessee court's claim that its decision was consistent with the Wennall note, the decision was an innovation. The facts did not square with the Wennall formula in that no prior legal obligation, contract or otherwise, had been established in the guardian.

In the 1975 Alabama decision in Slayton v. Slayton, the court claimed it was applying the material benefit exception to a case of manipulation of confidential relationships. The defendant was an uncle of the plaintiff; while he had not been the plaintiff's guardian, he had been the guardian of the plaintiff's sister. The two siblings had been orphaned by the death of their father and had received a death benefit under a workers' compensation statute. The defendant's confidential relationship with the family facilitated his wrongfully gaining control of the funds, which he then applied to a family business scheme. After the plaintiff reached adulthood, he approached the uncle about the money and the uncle paid him his share of the "loan," promising to later pay accrued interest. When the uncle later refused to pay the nearly fifteen years of interest, the nephew filed suit. The uncle did not deny the promise, however he still raised the amoral defenses of statute of frauds,

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88.  *Scott*, 17 Tenn. at 418-19 (involving ward's slave hired out to third party).
89.  *Id.* at 419-20.
90.  *Id.* at 420.
91.  *Id.*
92.  *Id.*
93.  *Scott*, 17 Tenn. at 420.
94.  *Id.*
96.  *Id.* at 589. Neither the sister, a ward of the defendant, nor the brother were reared by the defendant. *Id.* The sister was not a party to this suit, though it appears her funds were converted as well. *Id.*
97.  *Id.*
98.  *Id.*
100. *Id.*
statute of limitations, and past consideration.\textsuperscript{101} The court saw a moral obligation to pay the interest lost due to the funds’ wrongful removal by the defendant and in dictum, indicated the defendant was probably guilty of “conversion, misuse of funds or even fraudulent taking.”\textsuperscript{102} The court then proceeded to convert these wrongs into the material benefit formula by saying that the “defendant wrongfully took for his use and benefit funds belonging to plaintiff. . . . He received a material benefit therefrom.”\textsuperscript{103} The Alabama “landmark” case of \textit{Webb v. McGowin} was cited as settling the point that a subsequent promise on a material benefit was binding because a “moral obligation is a sufficient consideration.”\textsuperscript{104} Unlike the great bulk of the material benefit precedents, the defendant acquired the benefit through his wrongful act rather than through the plaintiff’s voluntary transfer.\textsuperscript{105}

The decisions discussed below did not strain to force fiduciaries’ moral obligation promises into the conventional applications of the moral obligation principle. In fact, precedents were cited for their rulings other than the principle that a moral obligation could constitute good or valuable consideration.\textsuperscript{106} In the 1893 Georgia case \textit{Brown v. Latham}, the defendant exerted undue influence over his aged father so that the father deeded his land to the son, supposedly in order to defraud creditors.\textsuperscript{107} An additional benefit of the scheme for the defendant was the disinheritance of his sister.\textsuperscript{108} Later the defendant promised to pay his sister one-third the value of the land, but stopped making payments shortly thereafter.\textsuperscript{109} The court declared that the defendant “concocted” the scheme and was able to realize it through his role as his father’s confidential adviser and counselor.\textsuperscript{110} The father might have entrusted his land to his son in an attempt to defraud creditors but not as a means to disinherit his daughter.\textsuperscript{111} The court said: “We think the moral duty of the defendant to account to his sister for her interest in the land, although it may not have been a legal interest, or one that could be enforced, would be sufficient consideration to uphold the contract” between the siblings.\textsuperscript{112} Referring to the lack of a prior legal

\begin{footnotes}
\item[101.] \textit{Id.} at 590. An additional defense was that he had incurred expenses equal to the accrued interest in prosecuting the workers compensation claims at the death of the plaintiff’s father twenty years before. \textit{Id.}
\item[102.] \textit{Id.}
\item[103.] \textit{Id.}
\item[104.] \textit{Slayton}, 315 So. 2d at 590.
\item[105.] \textit{Id.} at 589.
\item[106.] See \textit{Brown v. Latham}, 18 S.E. 421, 422 (Ga. 1893); \textit{Hyman v. Succession of Parker}, 726 So. 953, 954 (La. 1916).
\item[107.] \textit{Brown}, 18 S.E at 421-22. The court questioned whether the aged father knowingly participated with the son in the attempt to defraud the father’s judgment creditor. \textit{Id.}
\item[108.] See \textit{id.}
\item[109.] \textit{Id.} at 422.
\item[110.] \textit{Id.} at 422.
\item[111.] \textit{Id.} at 421-22.
\item[112.] \textit{Brown}, 18 S.E. at 422.
\end{footnotes}
claim, the Georgia court acknowledged that the facts did not fit under the *Wennall v. Adney* reporters’ note’s formula, but that did not preclude the court from effectuating a just result under natural law.

In the 1916 Louisiana case *Hyman v. Succession of Parker*, the plaintiff entrusted the management of her property to the testator, a lawyer who had been an intimate friend of her deceased husband. When the lawyer discovered that he had invested her property in worthless, forged mortgage notes, he confessed his wrong to her and substituted his own notes in the place of the forged notes. After his death, his estate refused to honor the testator’s notes on the grounds that no enforceable obligation existed because the deceased had not been negligent and because the notes were a mere "generosity" unsupported by consideration. As to the defendant’s negligence argument, the court responded that "this settlement was based on an admitted legal liability." In regard to the consideration issue, the court said that "the notes sued on import a valuable consideration, and the record before us discloses a valid consideration based on the failure of the agent to exercise due care in the investment of the funds of the principal." The court added that the agent was required to account to the principal for the funds entrusted to him. This entrustment point runs parallel to the reasoning of the Georgia court in *Brown* above. A fiduciary duty to hold the property consistent with the best interests of the owner was generated by the entrustment and a moral obligation arose when that charge was not carried out properly. The Louisiana court in *Hyman* made no attempt to square its ruling with the common law moral obligation principle’s requirements of either a prior legal obligation or receipt of a material benefit. The civilian approach taken here permitted the Louisiana court to address the merits in a direct fashion without the need to bury the equities as sub-text obscured by awkward manipulation of doctrine and precedent.

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113. See 137 Eng. Rep. at 138-40 n. a (claiming that only waivers and ratifications fulfilled the requirement that the moral obligation promise must revive a prior binding legal obligation).
114. 72 So. 953, 953-55 (La. 1916).
115. Id. at 954.
116. Id.
117. Id. at 955.
118. Id.
119. *Hyman*, 72 So. at 954.
120. The influence of the obligation incurred due to entrustment of property has played a role in the history of the development of common law contract. See KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 30, 247-48, 252, 283 n. 249 (1990) [hereinafter TEEVEN, HISTORY OF CONTRACT].
121. See *Hyman*, 72 So. at 954.
122. See id. at 955.
C. Contract Enforcement Harm Caused by Unfair Judgment

This strain of moral obligation promise is made for the purpose of consensual modification of an unfair judgment. This category may be distinguished from the Wennall note’s paradigm in that here the bar of the positive rule of law itself, in the form of the offending judgment, is the cause of the injury to the promisee. The amount of the offending judgment may be too high or too low; either way, the judgment bars the promisee’s otherwise legitimate prior claim and the promisor’s awareness of the harm caused by the judgment generates pangs of moral obligation. Although the promisor usually receives a benefit as a result of the defective judgment, such a case does not fall neatly within the conventional moral obligation principle applied to receipt of a material benefit because the judgment, rather than the promisee, conferred the unjust enrichment upon the promisor. Moreover, the harm to the promisee, whether a creditor or debtor, usually stands out in the facts as the overriding element.

In regard to the loss suffered by a debtor in overpayment on a debt, in the absence of a judgment, any excess mistakenly paid may be recovered from the creditor in restitution. However, if the excess amount is included in a final judgment, the amount is due even if erroneous. Relief could only come to the aggrieved party if the advantaged creditor subsequently agreed to cure the error by a promise to adhere to the terms in the original contract. Both harm to the debtor and benefit to the creditor reside in such a case. A seller of land in Turlington v. Slaughter made such a promise to a purchaser who objected to making payment

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124. In early decisions, any benefit received would be emphasized to the exclusion of a seeming overriding injury found in the facts in order to assure that the rationale fit neatly within the then nascent moral obligation principle for receipt of a material benefit. This happened in Doty v. Wilson, wherein a sheriff, the plaintiff, freed a debtor from debtor prison despite his failure to satisfy creditor. 14 Johns. 378 (N.Y. Sup. Ct. 1817). Creditor then obtained a judgment in the amount of the debt against sheriff due to his dereliction of duty. Id. Defendant-debtor later promised to indemnify plaintiff for the harm of being compelled to pay defendant’s debt. Id. The rationale in support of a binding promise focused solely on benefit defendant received in being freed with nary a reference to the penalty plaintiff suffered for being magnanimous to defendant. Id. The defendant could have promised payment to sheriff upon being freed but instead was motivated to promise reimbursement only when defendant was informed that sheriff had incurred the obligation and paid defendant’s debt. Id. at 382-83 (stating that debtor’s receipt of benefit is equivalent of previous request). Doty v. Wilson was later attacked because it violated Wennall note and Eastwood v. Kenyon due to lack of prior legal obligation to promise indemnity. See Ehle v. Judson, 24 Wend. 97, 98 (N.Y. Sup. Ct. 1840); Goulding v. Davidson, 26 N.Y. 604, 608-15, 620 (1863).
125. See Doty, 14 Johns. at 383.
126. See, e.g., Turlington v. Slaughter, 54 Ala. 195, 198 (1875) (stating that a judgment is conclusive against defenses that could have been raised during a lawsuit).
127. See, e.g., id. at 196-98.
pursuant to an erroneous chancery decree obtained by the seller. The seller promised that if the purchaser paid the decreed amount and it was later found in error, he would disgorge the excess. Later the purchaser proved the error and the 1875 Alabama court ruled the seller’s promise binding because “[t]his moral obligation originating from a positive legal duty to which he could have been compelled before the decree, will support an express promise to refund.” The court cited the 1817 New York decision Bentley v. Morse as a precedent. In Bentley, a debtor had paid off a debt but had to pay a second time when his creditor later obtained a judgment against him. When the creditor was apprised of the double payment, he promised to refund the second payment if the debtor could produce a receipt. The debtor produced the receipt for the first payment and the court enforced the promise supported by the creditor’s moral obligation to refund the extra payment.

The courts in both Turlington and Bentley cited as authority the traditional ratification and waiver precedents. The citations of ratification precedents of promises by a woman after coverture and by an adult upon reaching majority were not apt since no original legal obligation had existed in these ratification cases. Johnson’s reporter’s note to Bentley questioned the court’s decision because no prior legal obligation existed. The Bentley opinion did not seek a prior obligation but instead made a modern qualitative judgment: “The moral obligation is as strong as any in the cases in which it has been held sufficient to revive a debt barred by a statute or some positive rule of law.” The Turlington court, however, tried to

128. Id. at 197.
129. Id. at 195.
130. Id. at 197.
131. Turlington, 54 Ala. at 197 (citing Bentley v. Morse, 14 Johns. (N.Y.) 468, 468-69 (1817)).
132. Bentley, 14 Johns at 468.
133. Id.
134. Id. at 468-69. The rule in Bentley v. Morse for double payment cases was widely followed thereafter, e.g., Cameron v. Fowler, 5 Hill. 306, 308-09 (N.Y. 1843) (“within the principle in Bentley v. Morse”); Doyle v. Reilly, 18 Iowa 108, 113-14 (1864).
135. See Bentley, 14 Johns. at 469 (adult ratification and bankruptcy waiver); Turlington, 54 Ala. at 197 (waivers of bankruptcy and statute of limitations and ratification after coverture); see also Brunhoeber v. Brunhoeber, 304 P.2d 521, 523 (Kan. 1956); Stebbins v. County of Crawford, 92 Pa. 289, 295 (1879). Holt’s traditional moral obligation precedents were championed by the Wennall reporters. See Ball v. Hesketh, 90 Eng. Rep. 541 (K.B. 1697); Heyling v. Hastings, 91 Eng. Rep. 1157, 1179 (K.B. 1699); Wennall v. Adney, 137 Eng. Rep. 137, 140 n.a(C.P. 1802).
136. See Bentley, 14 Johns at 468-69.
137. Id. at 468. Johnson was urging New York to stay within the construct enunciated 15 years earlier in the Wennall note, which oversold the view that only formerly legal obligations revived by a subsequent promise were binding exceptions to the past consideration rule. Id.
138. Id. at 468-69. See Anspach v. Brown, 7 Watts 139, 140 (Pa. 1838), which states “Let it be that there is an obligation, in morals, to pay a debt barred by judgment, which will support an express promise to pay it.”
supply a prior legal obligation to answer Johnson’s objection. The Turlington court declared that the seller was under a legal duty to refrain from taking the decree for more than the correct amount and that subsequent to the decree he was under a moral obligation, originating from that prior legal duty, to abate the excess in the decree. As to the applicability of the bankruptcy and statute of limitations waiver precedents to the Turlington and Bentley cases, the bankruptcy waiver analogy worked better since it involved waiver of a prior certificate of bankruptcy. On the other hand, the harm in Mansfield’s bankruptcy precedent emanated from the debtor’s wrong on the eve of bankruptcy and not from a judgment. Indeed, none of the traditional waiver and ratification precedents involved facts like those in Turlington and Bentley, wherein an erroneous judgment caused harm to the debtors in both cases. Turlington and Bentley constituted an extension of the traditional waiver precedents to the case of waiver of an erroneous judgment, which itself caused harm to a debtor in its mandate to pay more than the original contract amount.

In the case of harm suffered by a creditor because of a judgment rendered for less than the actual fair amount owed, the debtor might promise to pay more than the judgment amount because of a felt moral obligation to be fair to the creditor. Mansfield’s bankruptcy waiver decision Trueman v. Fenton is an early example of a debtor’s promise to avoid the injury if the debt were exonerated by the certificate of bankruptcy. Although this precedent more broadly supports enforcement of a debtor’s bankruptcy waiver, on its facts Mansfield emphasized the fraud and gross dishonesty of the debtor in buying a large quantity of linen from the plaintiff “on the eve of a bankruptcy.” Still, Trueman is only a signpost along the way and does not completely fit here. The harm suffered by the creditor was caused by the debtor’s wrong rather than by a faulty judgment, even though it is true that the debtor’s malfeasance was insulated from attack once enthroned in the judgment.

Injuries caused by insufficient judgments are illustrated by the next two cases. In the 1879 decision Stebbins v. The County of Crawford, the former county treasurer promised to pay the new treasurer excess money still in his possession because of an auditor’s error that became part of the annual judgment for county taxes. In the

139. See Turlington, 53 Ala. at 197-98.
140. Id. at 197.
141. And of course a bankruptcy discharge lowers debtor’s obligation while the judgments in Turlington and in Bentley increased debtors’ obligations. See id. at 196-97; Bentley, 14 Johns. at 468-69.
142. See Turlington, 54 Ala. at 197; Bentley, 14 Johns. at 469.
143. Turlington, 54 Ala. at 195; Bentley, 14 Johns. at 469.
145. Id. at 1234 (noting that “all debts of a bankrupt are due on conscience, notwithstanding he has obtained his certificate”).
146. Id.
147. 92 Pa. 289 (1879); cf. State v. Butler, 11 Tenn. 418, 428 (1883), which states “[N]otwithstanding the voluntary payment of taxes illegally assessed does not constitute or confer a
1956 Kansas decision *Brunhoeber v. Brunhoeber*, the former plaintiff's husband felt bad about how little his ex-wife would receive under the divorce decree, so he promised to pay her more. The courts in *Stebbins* and in *Brunhoeber* acknowledged that, in the absence of a subsequent promise, the judgment extinguished the plaintiff's claim. But, as the *Brunhoeber* court put it, "[t]he moral obligation to pay these items was not extinguished." The promisor in each case felt a moral obligation because the judgment denied funds which in fairness belonged to the promisee.

Neither of the opinions emphasized the benefit to the promisor, probably because the facts did not fall under the conventional material benefit exception as the benefit did not flow from the promisee. Both courts drew analogies between judgments that barred enforcement of plaintiffs' otherwise lawful claims and the bars of bankruptcy, statute of limitations, and traditional positive rules of law highlighted in the restrictive 1802 reporters' note to the English moral obligation case *Wennall*. In *Stebbins*, the court approved of the trial court opinion that "a moral obligation is sufficient to support an assumption to pay a debt which cannot be collected by reason of the intervention of some positive law." The *Stebbins* court was so emphatic about the correctness of the analogy drawn between waiver of a statute of limitations and waiver of an unfair judgment that it stated, "[a] discussion of it would be a mere waste of logic." Query whether a doctrinaire common law court that strictly adhered to the *Wennall* note would so flexibly expand the scope of the waiver exceptions to the past consideration rule.

Before leaving modifications of unfair judgments, a comment should be made about the relevance of a formal subsequent promise on judicial enforcement of the modification. It should be noted that, for moral obligation promises generally, some states have attempted to legislate special status for written moral obligation right of action to recover them back, yet it did create a moral obligation on the part of the city to repay them, and was a sufficient consideration to support a subsequent promise to do so."

148. 304 P.2d 521, 523 (Kan. 1956) (indicating that decree was based on parties' property settlement agreement).

149. *Stebbins*, 92 Pa. at 295 (saying judgment ended former treasurer's obligation to turn over money to county); *Brunhoeber*, 304 P.2d at 523 (saying divorce decree ended former husband's obligation to pay delinquent child support).

150. *Brunhoeber*, 304 P.2d at 523; see *Stebbins*, 92 Pa. at 295.

151. *Brunhoeber*, 304 P.2d at 524; *Stebbins*, 92 Pa. at 295.

152. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 86 (1) (1981) (covering "benefit previously received by the promisor from the promisee").


155. Id.

156. The English courts have not strayed beyond waivers of bankruptcy and statute of limitations and adult's ratification. See SIR GUENTER TREITEL, THE LAW OF CONTRACT 73 (10th ed. 1999).
promises. Also, formality would be imperative in fact situations falling under more traditional writing requirements governed by the statute of wills and the statute of frauds. In addition to legislative enactments, judges have tended to find formality relevant to moral obligation promises today. Assuming that legislated rules of formality are not in play, some state courts, as in Pennsylvania, have sought a higher degree of formality for promises to alter unfair judgments. In *Anspach v. Brown*, the Pennsylvania court proclaimed in 1838 that it put a judgment debt on "higher footing than a debt barred by the statute of limitations;" a limitation which could then be waived informally in that state. Later that century, a Pennsylvania court in *Stebbins* chimed in that "[s]uch a debt, it is true, is put upon a higher footing than one barred by the Statute of Limitations," but with requisite formality, the promise would be binding. Pennsylvania had not yet adopted Lord Tenterden's Act; however, today formality is widely required for waivers of the Wennall note's revered positive rules of law of bankruptcy and statute of limitations. The *Anspach* opinion stated, "there would be imminent danger of abuse" if a jury could consider an informal promise to alter a judgment, and that therefore to modify a judgment, there must be "a formal and deliberate promise to allow these payments, already judicially passed upon." III. RELIANCE HARDSHIP MOTIVATING SUBSEQUENT PROMISE

Defendant’s inducement of plaintiff’s quasi-delictual reliance loss may generate in defendant a sense of moral obligation, which may support enforcement of defendant’s subsequent indemnity promise. The doctrine applicable to this circumstance is the moral obligation principle, not promissory estoppel, because the

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159. Pennsylvania legislature has placed more importance on formality than many jurisdictions; it is the only state to permanently adopt Williston’s Uniform Written Obligations Act (1925), cited in Samuel Williston, *Williston on Contracts* § 219A (George J. Thompson rev. ed. 1938).

160. 7 Watts 139, 140 (Pa. 1838).

161. 92 Pa. 289, 295 (1879).

162. Lord Tenterden’s Act, 9 Geo. IV, c. 14, s. 1 (1828) (requiring statute of limitations waiver be by signed writing); cited in James John Wilkinson, *Treatise on the Limitation of Actions* 83-84 (1829).


164. *See* Restatement (Second) of Contracts § 86 cmt. b (1981); 1A Corbin, *supra* note 4, § 223; *see also* E. Alan Farnsworth, *Contracts* 57 (3d ed. 2000) (saying that it is easier to waive statute of limitations than bankruptcy).

165. 7 Watts at 140 (adding “a distinct and formal promise” was required).
In this moral obligation category, the promise follows the reliance and without the subsequent promise, no relief could be granted to the relier.\(^{166}\) That is not to say, however, that relief would be unavailable under promissory estoppel\(^{168}\) or by disingenuous manipulation of consideration doctrine,\(^{169}\) if the promisee relied upon a prior moral obligation promise.\(^{170}\) While moral obligation liability applies to a promise subsequent to reliance, promissory estoppel applies to reliance subsequent to a promise.\(^{171}\) Whereas reliance under promissory estoppel creates a fresh claim, a subsequent promise engendered by reliance harm justifies indemnification for the past loss.\(^{172}\) Liability on the moral obligation involves three elements: an expectation raised by defendant through a means short of a promise; plaintiff's reasonable reliance on the raised expectation; defendant's subsequent promise to compensate plaintiff for reliance suffered.\(^{173}\) A whiff of these elements can be found in the Wennall note where its reporters attempted to rationalize away the 1587 English chestnut Style, the first reported moral obligation decision.\(^{174}\) In order to bring the old precedent into conformity with the need for defendant's previous request, the reporters announced that the physician treated the boy in reliance on his absent father's credit and that the father subsequently promised to pay.\(^{175}\) Indeed, the near

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\(^{166}\) See Restatement (Second) of Contracts § 90 (1981).

\(^{167}\) See Restatement (Second) of Contracts § 86 cmt. a (1981).


\(^{170}\) See Restatement (Second) of Contracts § 90 cmt. b (1981) (suggesting that promissory estoppel may be necessary to avoid injustice of unjust enrichment).

\(^{171}\) See Restatement (Second) of Contracts §§ 86 cmt. a, 90 cmt. a (1981).

\(^{172}\) While promissory estoppel looks to the future and moral obligation principle to the past, both doctrines are used to fulfill reasonable expectations. Id.


\(^{174}\) Style v. Smith (1587) cited in Marsh and Rainford's Case, 74 Eng. Rep. 400, 401 (K.B. 1588) (noting that the defendant promised to pay physician for care of defendant's ill son while defendant was away); Wennall, 127 Eng. Rep. at 140 n.a; see TEEVEN, PRIOR OBLIGATIONS, supra note 37, at 98.

\(^{175}\) Wennall, 127 Eng. Rep. at 140 n.a (rationalizing that in Style v. Smith it "was most probably founded on his credit; which credit, it fairly inferred from circumstances by the physician, might operate to charge the father in the same way as his request would operate.").
tortious factor pleaded in assumpsit requiring that consideration moves from the plaintiff in reliance on defendant’s request, emanates from the influence of the past consideration rule enunciated in 1568 in *Hunt v. Bate.* The relevance of reliance in the determination of actionability can be found in assumpsit’s predecessors as well. Assumpsit’s emphasis on prepayment and consequential damages is reliance-based logic which may have been drawn from the old ecclesiastical court action *fidei laesio* for plaintiff’s reliance damages in trusting the promisor. And in Fifteenth Century chancery, when plaintiff relied on a promise, a moral duty arose to fulfill the promise.

Attention is given to a sampling of cases that have applied the moral obligation principle to promises made on account of reliance harm induced by defendant. Courts have utilized varying techniques to find these subsequent promises binding. A few have taken the straightforward approach that the moral obligation raised by the reliance loss suffered supported the subsequent promise. A second technique has been to claim consideration present by manipulation of the doctrine. A third device has been to employ the conventional moral obligation theory to discover some benefit notwithstanding the presence of facts suggesting the subsequent promise was made because of reliance harm. A case using the straightforward approach to start with, ironically, was cited by the Restatement Second as a good example of a case falling under the conventional moral obligation principle, but the facts of the case tell a different story. Despite the unjust enrichment requirement in the text of *Restatement Second* Section 86, its illustration number eight was based on the earlier decision *Haynes Chem. Corp.*, a case devoid of any benefit flowing to

176. 73 Eng. Rep. 605, 606 (K.B. 1568) (plaintiff bailed out defendant’s servant in his absence and defendant subsequently promised remuneration, but the court declared: “the master never requested the plaintiff to do it, on behalf of his servant, but he did it of his own head.”); BAKER, supra note 8, at 314 (pointing out that insufficiency of love and affection was a source of past consideration rule); cf. S. F. C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 359 (2d ed. 1981) (adding that past consideration follows from earlier trespass requirement that plaintiff must rely).


178. See id. at 416-26 (saying that the consideration pleaded in early assumpsit was similar to inducement of fidei laesio, which action assumpsit had replaced before the mid-sixteenth century); MILSOM, supra note 176, at 336-38, 357.


184. Id.
In this 1922 Virginia case, the defendant requested that the plaintiff submit an advertising plan and the plaintiff was assured that "a decision in good faith" would be made "on the merits of the plan." The plaintiff spent large sums of money to prepare the plan, but the defendant rejected the plan without considering its merits. Subsequently, the defendant's general manager acknowledged they had treated the plaintiff shabbily and said, "your work was fine; and we feel you ought to be recompensed, and we would like for you to send us a bill for your expenses." The court applied the moral obligation principle to enforce the promise to reimburse plaintiff's reliance expenses because plaintiff was "moved" to prepare the plan on assurances that the defendant would give it their "heartiest consideration." The defendant objected to the use of the moral obligation principle since the facts did not fit the traditional requirement that a subsequent promise could only revive a precedent legal obligation now suspended. The court acknowledged that the defendant would not have been obligated if the advertising plan had been unsatisfactory, but said, "we are of opinion that the law implies a promise to pay any reasonable amounts expended by plaintiffs in complying with the request of the plaintiff to prepare the plans." Liability was found for bad faith at the contract negotiation; evidence supported a conclusion the plaintiff had fulfilled the negotiating conditions defendant placed on him, but defendant had not acted in kind. The defendant's promise to reimburse reliance costs was binding even though defendant received no benefit whatsoever from plaintiff's advertising plan.

Another good example, in a different context, of the straightforward application of the moral obligation principle in support of a promise to reimburse reliance harm is Hurst. A businessman, who later died, misrepresented his firm's financial status to induce the plaintiff to facilitate a loan from plaintiff's firm to the defendant's firm. The plaintiff considered the loan to be his individual obligation, so he reimbursed his firm when the deceased's firm became insolvent. The businessman felt responsible for having imposed upon plaintiff, who had relied on his integrity, to

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185. 112 S.E. 802 (Va. 1922); RESTATEMENT (SECOND) OF CONTRACTS § 86 reporter's note cmt. e (1981).
186. Haynes, 112 S.E. at 803.
187. Defendant's president rejected plaintiff's plan sight unseen simply because he decided to have a New York agent. Id. at 804.
188. Id.
189. Id.
190. Id.
192. Id. at 804.
193. Id.
194. 26 A. 956 (Md. 1893).
195. Plaintiff and defendant were each partners in their respective firms. Id. at 957.
196. Id.
obtain the loan "when he was on the verge of failing." So, the defendant purchased a life insurance policy on his own life, with plaintiff as named beneficiary, and told third parties that the policy was to indemnify the plaintiff for his personal loss suffered as a result of defendant's wrong. The 1893 Maryland decision ruled that the plaintiff's claim was enforceable because the "[defendant] obtained from the [plaintiff] the loan of $2,000 by false representations. He thereby placed himself under a moral obligation which did not rest with his firm" since deceased made the false statements that induced plaintiff to facilitate the loan. This moral obligation might have been grounded upon deceased's receipt of a material benefit if deceased had promised to repay the loan for that reason; however, the deceased defendant did not feel morally obliged to make amends until he was informed that plaintiff personally reimbursed his own firm.

Under the second technique, used by more conservative courts to enforce the subsequent promise, a pretense was made that consideration supported the promises made due to reliance harm suffered. There were two versions of this. In one, the reliance was said to constitute consideration; in the other, the moral duty generated by the reliance was sufficient consideration. Manipulation of the consideration doctrine could be done by exploiting vague notions buried in the legal history of the doctrine's development as a means to impart discretionary justice without admitting it. In reality, the facts in these cases did not involve either bargained-for reliance tendering bargain consideration, or unjust enrichment; rendering the conventional moral obligation principle inapplicable.

In Grady v. Appalachian Electric Power Co., the court said that the employer's custom of providing disability benefits to injured employees had been relied upon by the plaintiff who had stayed on the job after he became aware of the custom. The court said that no legal obligation was created by the custom or reliance thereon because of its indefiniteness; rather, the reliance upon the uncertain custom supported the company's specific moral

197. Id.

198. The issue in the case concerns whether an insurable interest exists in plaintiff as a creditor. Id. at 957-58. The plaintiff convinced the court that, although the funds were issued by his firm, of which he was a senior partner, the loan did not fit the firm's business plan and were understood as advances from the firm to plaintiff. Id.


200. See infra notes 201-02.


203. Cf. Henderson, supra note 16, at 1177-78 (commenting that the gain under moral obligation principle is often drawn from loss incurred). Shouldn't the principle encompass promisee's loss irrespective of promisor's gain?

204. 29 S.E.2d at 883.
obligation promise of a disability benefit after plaintiff's injury. The West Virginia court concluded that the lack of employee's bargained-for reliance constituted consideration for the employer's subsequent promise to provide a disability for life. The court said if "it was customary on the part of the defendant, to provide for injured employees, through methods akin to a pension ... and, relying thereon, [plaintiff] continued to work, [that] is alone sufficient to justify us in saying that there was a consideration for any promise thereafter made." But, the reliance had not been bargained for since the facts gave no hint that the custom was an inducement at hiring, nor was there any indication that during the course of employment a bargain had been struck for disability protection in exchange for continued work. Regardless, the terms of the disability benefit were too ambiguous for the use of either the bargain theory or promissory estoppel until they were specifically enunciated subsequent to the injury being suffered. The court added that it was "disposed to adopt a liberal view" of the consideration doctrine when the facts concerned a worker's injuries.

A few jurisdictions have simply concluded that the moral obligation raised by the reliance constituted consideration for the subsequent promise; ratification cases have sometimes been handled in this manner. In the well known 1855 decision Hemphill v. McClimens, a Pennsylvania court said that a moral obligation had been created by the married woman under disability of coverture in "abusing the confidence" the contractor reposed in her when she "induced the plaintiff to expend his time, labor, and money, in putting up a saw-mill for her son, by promising that she would pay for the work." The court said that her ratification, subsequent to completion of the work and to her divorce, was supported by a "moral duty, not enforceable by law, [which] is a sufficient consideration for an express promise to perform that duty." Under Pennsylvania's liberal treatment of moral obligation ideas, the reliance ignored the moral obligation, which acted as consideration to

205. Id. at 881-82 (indicating that the agent said the company would pay plaintiff $70 a month for life).
206. Id. at 883.
207. Id.
208. See id.
209. On a side issue, the court ruled out promissory estoppel for the reliance on company agent's remark that workers's compensation was unavailable since plaintiff should have realized that agent had no control over the matter. Grady, 29 S.E. 2d at 883.
210. Id.
211. See Lee v. Muggeridge, 128 Eng. Rep. 599, 603 (C.P. 1813) (involving married woman's ratification of earlier promise under coverture which had induced plaintiff to extend credit to her son-in-law).
212. 24 Pa. 367, 371-72 (1855) (explaining that the woman was liable when the contractor stopped work because of her son's inability to pay).
213. Id. at 371. Promissory estoppel would possibly be available on her first promise were it not for its voidness.
support her subsequent ratification.\textsuperscript{214} Lewis, C. J.'s, qualification to the rationale was an attempt to provide definable boundaries grounded upon the facts. Lewis said he dissented from any part of the opinion that held that a woman could waive her former coverture and thereby be liable for work which was not done "on the faith of her promise."\textsuperscript{215} That is, he could only support plaintiff's claim if he relied upon her good faith to not raise the coverture defense, but in the absence of such reliance, Lewis did not think the moral obligation principle could support a former married woman's waiver.\textsuperscript{216}

Still other courts that were reluctant to manipulate the consideration doctrine and were unwilling to admit departure from the conventional moral obligation principle, followed a third path and found a secondary material benefit in facts which were heavily laden with evidence that the motive for the subsequent promise was to recompense for reliance harm the promisor had induced. In the 1940 Wisconsin case \textit{In re Schoenkerman's Estate}, a widower requested his mother-in-law and sister-in-law to move from Chicago to Milwaukee to help him care for his minor children.\textsuperscript{217} In reliance, the sister-in-law quit her job in Chicago and she and her mother moved to Milwaukee, taking over the child rearing for the next ten years.\textsuperscript{218} The only remuneration they received was room and board until the tenth year when the widower gave each of them promissory notes.\textsuperscript{219} After his death, his estate resisted payment on the notes because they were gifts.\textsuperscript{220} After reviewing the reliance facts in the informal long-term relationship, the court adapted the material benefit exception to enforce the notes with only oblique reference to the reliance in the rationale.\textsuperscript{221} The court said, "the decedent was manifestly under a moral obligation to pay the claimants in addition to what they had received for their ten years of service to him. In executing and delivering the notes to them he plainly recognized that obligation."\textsuperscript{222} Another example of this approach is the more recent 1971 decision

\begin{itemize}
  \item 214. \textit{Id.}
  \item 215. \textit{Id.} at 372.
  \item 216. \textit{Id.} at 371-72.
  \item 217. 294 N.W. 810, 811 (Wis. 1940).
  \item 218. \textit{Id.}
  \item 219. \textit{Id.}
  \item 220. \textit{Id.}
  \item 221. \textit{Id.} at 811-12.
  \item 222. \textit{In re Schoenkerman's Estate}, 294 N.W. at 811-12. The court added: "As a moral obligation existed to pay for the great excess of value of the services received by the decedent over the value of the board and lodging received from the decedent by claimants, that moral obligation will be presumed to be the consideration for the notes." \textit{Id.} at 812. Judicial rationales in other cases as well have set out significant reliance facts but stuck to more traditional moral obligation verbiage in stating the justification. \textit{E.g.}, Bender v. Highway Truck Drivers & Helpers Local 107, 598 F. Supp. 178, 187 (E.D. Pa. 1984) (involving reliance of plaintiff continuing to work without salary during union's financial difficulties).
\end{itemize}
Snow v. Nellist.\textsuperscript{223} A landowner encouraged his neighbors to build their house on his land under the peculiar informal understanding that title would eventually vest in them after they had made "rent" payments for an unspecified amount of time.\textsuperscript{224} After the plaintiff had built his house and made ten years of payments, the landowner indicated he may change his mind, but gave the plaintiffs a promissory note to cover their "rent" payments.\textsuperscript{225} The landowner also arguably indicated he might will the property at his death to plaintiff but in fact did not.\textsuperscript{226} In search of a theory to justify enforcement of the note, the Washington court indicated that the focus could not be on plaintiff's reliance since a detriment to the promisee would not qualify for application of the material benefit exception.\textsuperscript{227} Thus, the court isolated an unjust enrichment received by promisor in the form of the rent payments.\textsuperscript{228} Still, elements of benefit and reliance are found in the court's reasoning. The court stated that the plaintiff made payments "not as rent ... but in reliance upon the promise ... to eventually vest title to the property in him."\textsuperscript{229} The court continued, "When [promisor] changed his mind about leaving his property to the [plaintiff] he came under at least a moral obligation to return the money he had received."\textsuperscript{230}

In surveying the above-discussed reliance cases, the moral obligation seems to be grounded on a wrong committed by the promisor in addition to the induced reliance. Often the wrongful behavior is linked to the representations that induced reliance.\textsuperscript{231} This factor is not present in all instances, but this added element could make the difference in a close case. In Haynes Chem. Corp., the promisor did not make a good faith evaluation of the merits of the plaintiff's submitted advertising plan.\textsuperscript{232} In Hurst, the promisor misrepresented his firm's financial condition to the lender.\textsuperscript{233} In Hemphill, a married woman induced completion of construction for the benefit of her insolvent son by abusing the confidence the contractor placed in her that she would not later raise the coverture defense.\textsuperscript{234} In In re Schoenkerman's

\begin{thebibliography}{99}
\item 224.  Plaintiffs had intended to build their house elsewhere but were induced by landowner to build their house on his land instead. Id. at 141, 486 P.2d at 118 (indicating landowner provided money to plaintiff to build house).
\item 225.  Id. at 141-42, 486 P.2d at 118.
\item 226.  Id.
\item 227.  Id. at 142-43, 486 P.2d at 118-19.
\item 228.  Snow, 5 Wash. App. at 143, 486 P.2d at 119.
\item 229.  Id. at 142, 486 P.2d at 118-19.
\item 230.  Id. at 142, 486 P.2d at 119.
\item 232.  112 S.E. at 804-05.
\item 233.  26 A. at 956.
\item 234.  24 Pa. at 371.
\end{thebibliography}
Estate, the widower took extreme advantage of his in-laws in paying them only room and board during ten years service.\textsuperscript{235} Finally, in Snow, the promisor changed his mind and did not deed his property to the plaintiff, his friend and neighbor, after the plaintiff had made payments, had built his house on the defendant's property instead of elsewhere, and had been an occupant for many years.\textsuperscript{236}

One remaining question regarding the above reliance cases concerns why reliance on the previously raised expectation did not afford plaintiff the use of promissory estoppel once the doctrine was applied with some regularity by the second quarter of the twentieth century. The explanation was not because the raised expectation did not cause the reliance or because the reliance was not substantial enough. Rather the answer resides in the inadequacy of the original expectation in fulfilling the promise requirement of promissory estoppel. In Grady, the custom of providing disability benefits was too vague.\textsuperscript{237} Likewise, in Snow, the terms of the original loose understanding that title to the new house would eventually vest in plaintiff were likely too amorphous.\textsuperscript{238} And, in In re Schoenkenman's Estate, the widower originally made no promise of cash wages to his in-laws for their domestic services.\textsuperscript{239} As to the cases decided earlier than the 1930s, if it was assumed that promissory estoppel would have been available to those courts, similar conclusions would here be reached. Thus in Haynes Chem. Corp., the original understanding was at the negotiation level and only obligated defendant to make a good faith study of plaintiff's advertising plan.\textsuperscript{240} In Hurst, the decedent's firm, and not the decedent, made the original promise to repay the loan.\textsuperscript{241} And in Hemphill, the original promise made while under coverture was void.\textsuperscript{242} Thus the only theory available to these aggrieved plaintiffs was to sue on the defendant's promise made subsequent to plaintiff's reliance under the moral obligation principle or moral consideration.

Before leaving this section on reliance, a few thoughts will now be explored as to how promissory estoppel could apply in a moral obligation fact situation. As mentioned at the beginning of this section, if the plaintiff relied upon a subsequent promise made on a prior moral obligation, whether to disgorge or indemnify, promissory estoppel could then provide relief, even if the moral obligation principle did not make the subsequent promise binding.\textsuperscript{243} Of course the motive for the

\textsuperscript{235} 294 N.W. at 810-12.
\textsuperscript{236} 5 Wash. App. at 141-42, 486 P.2d at 118.
\textsuperscript{237} 29 S.E.2d 878, 881 (W. Va. 1944).
\textsuperscript{238} 5 Wash. App. at 141-42, 486 P.2d at 118-19.
\textsuperscript{239} 294 N.W. at 811.
\textsuperscript{240} 112 S.E. 802, 803-04 (Va. 1922); cf. Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 274-75 (Wis. 1965) (granting promissory estoppel on reliance on an indefinite promise of a franchise made at negotiation level).
\textsuperscript{241} 26 A. 956, 957 (Md. 1893).
\textsuperscript{242} 24 Pa. 367, 371 (1855).
\textsuperscript{243} \textit{Cf.} RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b (1981) (stating that promissory estoppel could apply to unfairness of unjust enrichment); \textit{id.} at § 86 cmt. b (1981) (stating smaller
promise relied upon could be because of a moral obligation engendered either by unjust enrichment or a past harm. Both detrimental reliance and the use of the moral obligation principle on past wrongs involve injuries which seem to fall somewhere between the fields of tort and contract. At an abstract level, promissory estoppel and the moral obligation principle share the basic natural law notion that a promise should be honored if necessary to avert an injustice.\(^{244}\) In the broader natural law sense, both rules involve a natural or moral obligation, and some courts refer to this natural or "moral obligation" which arose when there was detrimental reliance upon a promise.\(^{245}\)

The interplay between the moral obligation principle and promissory estoppel can be seen in the following cases involving reliance upon a moral obligation promise. In the early cases, before promissory estoppel had been accepted beyond the bounds of reliance on gratuitous promises,\(^{246}\) the consideration doctrine was manipulated so that reliance on a worthy promise could be remedied. In *Ellicott v. Turner*, a grandfather felt a moral obligation toward his fatherless grandchildren and so promised his future son-in-law to reimburse him for expenses of maintaining the grandchildren.\(^{247}\) After the marriage, the step-father relied and supplied maintenance expenses.\(^{248}\) The Maryland court said, "[h]ad the services been rendered before the grandfather promised to pay for them, his promise would have been unavailing," but since the promise induced the step-father's reliance, the plaintiff's claim was actionable as a contract.\(^{249}\) The court speculated that the plaintiff lost in the landmark case *Mills v. Wyman* because the father's promise was extended after the plaintiff had rendered services to his adult son.\(^{250}\) If promissory estoppel had been available as an independent doctrine in the mid-nineteenth century, the court could have stopped its

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244. A charitable subscription presents a transaction that could arguably be held binding under the moral obligation principle as well as promissory estoppel. See Caul v. Gibson, 3 Pa. 416, 416 (1846) (asserting that when one signs a charitable subscription, there is moral obligation to fulfill it); cf. Miller v. W. Coll. of Toledo, 52 N.E. 432, 436 (Ill. 1898) (stating "[w]hen money has been expended, or liabilities have been incurred, in reliance upon the note... the donor or maker thereof is, in good conscience bound to pay.").


247. 4 Md. 476, 485-86 (1853).

248. Id.

249. Id. at 493.

analysis there and applied promissory estoppel. But as it was, the court sounded as though it were the year 1800 as it blithely concluded that the moral obligation provided the consideration. The court said, “although a grandfather was not bound to support his grandchildren ... yet he was capable of making a contract by him on his own credit for their benefit, and such contract would constitute both a good and valuable consideration.”

By the second quarter of the twentieth century, a court might still be inclined to apply consideration logic, but now the impact of reliance on a moral obligation promise was handled more directly. In *Medberry v. Olcovich*, a California appellate court used language that sounded more like justifiable reliance rather than bargain analysis to say that the promisor ought to be barred from withdrawing his moral obligation promise after plaintiff had relied upon it. The defendant had felt morally obliged to promise to pay for plaintiff’s son’s medical expenses because the boy was injured while riding in a car owned by defendant and driven by defendant’s teenage son. The moral obligation was heightened by the fact that plaintiff was hesitating to take his son to a physician due to plaintiff’s strained financial condition. The appellate court ruled that a moral obligation rested on the defendant to furnish assistance and that obligation constituted sufficient consideration for the defendant’s indemnity promise. This is a moral obligation to indemnify for harm done. The court added that defendant ought not be permitted to repudiate his promise after there had been medical “expenses incurred in reliance upon his promise...” The California Supreme Court refused to review the case, but offered its comment that an appeal was refused even though the decision below could be assumed in part based on a sufficient moral obligation. Then the top court supplied promissory estoppel reasoning, for what was claimed constituted consideration, when it said, “the plaintiffs suffered prejudice by reason of the expense incurred by them on the promise of the defendant...Under such circumstances, a sufficient legal consideration for the promise was present.” Promissory estoppel may have been...

251. *Ellicott*, 4 Md. at 492.
252. *Id.* at 493.
254. *Id.* at 554-55.
255. *Id.* at 555.
256. *Id.*
257. *Id.*
259. *Id.* at 282. There are problems with the use of consideration logic because care of plaintiff’s son is no benefit to promisor. If the facts were that defendant was bargaining for the financially-strapped father of injured boy to take him to a physician, then perhaps the promisor’s benefit could be the assuaging of promisor’s sense of responsibility for what happened. *Cf.* Foltz v. First Trust & Sav. Bank of Pasadena, 194 P.2d 135, 137 (Cal. Dist. Ct. App. 1948) (interpreting the California Supreme Court dictum in *Medberry* to mean California’s position was that a moral obligation could act as consideration if there was reliance on promise).
preferable to manipulation of doctrine, but California was not quite ready to apply promissory estoppel beyond the limited use of promissory estoppel at that time.\textsuperscript{260}

In the last two cases discussed, plaintiff and defendant were not in privity with each other at the time the moral obligation arose,\textsuperscript{261} had that been the case, the preexisting duty rule would have presented an additional barrier to enforcement of the promise. This added impediment was raised as a defense in the context of an employment contract in \textit{Megginnes v. McChesney}.\textsuperscript{262} A 74 year old man who was ill and dependent on his nurse of five years, gave her a $5,000 promissory note three weeks before he died.\textsuperscript{263} He told third parties that he wanted to make up for how much he had underpaid her during the prior five years.\textsuperscript{264} The preexisting duty rule was raised as a defense and the Iowa court agreed that if the note was to assuage his moral obligation for underpaying her, then the promise was not binding because she had been paid her agreed-upon salary of $50 each month.\textsuperscript{265} The court said, however, if she were given the note not only to fulfill his sense of moral obligation for underpayment but also to induce her to continue to take care of him, then her reliance on the note would support the note.\textsuperscript{266} It sounded as though the court was ready to openly apply promissory estoppel, but this was the year 1917;\textsuperscript{267} instead, the court obtained a fair outcome by finding consideration.\textsuperscript{268} The court said, "[s]ervices rendered subsequent to such an understanding and in pursuance thereof would constitute a valuable consideration for a promise to pay her such as contained in the note given her."\textsuperscript{269} It is not clear from the facts whether the promisor bargained for the nurse to remain on the job in exchange for his note or whether he simply hoped

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\textsuperscript{260} See Boyer, \textit{supra} note 246, at 643-44. \textit{Medberry v. Olcovich} could be logically rationalized as a case for promissory estoppel or for moral obligation principle. The medical treatment obtained in reliance upon the reimbursement promise qualifies it for promissory estoppel, and defendant's moral obligation generated by a sense of guilt over the injuries suffered while riding with promisor's son qualifies it for the moral obligation principle. Promissory estoppel has the advantage of focusing more directly on the unbargained-for reliance harm than the open-ended moral obligation principle applicable to unjust enrichments and, here, to harm caused.

\textsuperscript{261} See \textit{supra} notes 246, 252.

\textsuperscript{262} 160 N.W. 50 (Iowa 1916).

\textsuperscript{263} Id. at 51.

\textsuperscript{264} Trial court ruled against plaintiff due to no prior legal obligation as required by \textit{Wennall} note. \textit{Id.} at 55 (referring to \textit{Wennall} v. Adney, 127 Eng. Rep. 137, 140 n.a. (C.P. 1802)). The elderly gentleman was blind and very dependent on her, and court noted she was totally trustworthy in administering his health and business affairs. \textit{Id.} at 51-52.

\textsuperscript{265} \textit{Id.} at 54-55. In this circumstance the preexisting duty rule and past consideration rule intersect.

\textsuperscript{266} \textit{Id.} at 55.

\textsuperscript{267} Promissory estoppel was not regularly used beyond gift promises until the middle of the twentieth century. See \textit{Teeven, HISTORY OF CONTRACT, supra} note 120, at 246-57.

\textsuperscript{268} \textit{Megginnes}, 160 N.W. at 56-57.

\textsuperscript{269} \textit{Id.} at 55.
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she would thereby be induced to remain.\textsuperscript{270} In cases of elderly single persons without family providing elder care, the moral obligation principle can aid them in their needs and alleviate potential unfairness to caregivers. The laws related to contracts, gifts, and inheritance are not designed to accommodate the aged person’s need to secure a promisee’s goodwill in continuing to provide necessary health and elder care.

In the 1959 employment case of \textit{Feinberg v. Pfeiffer}, an employer promised a pension to an employee of thirty-seven years in light of her “long and faithful service” and her “exceptional ability and skill.”\textsuperscript{271} The employer told her she could start to draw the pension whenever she decided to retire.\textsuperscript{272} One and one-half years later at age fifty-seven, the plaintiff elected to retire at a time when other employment would have still been open to her if she chose to take a position elsewhere.\textsuperscript{273} Pension payments were made until she was over sixty years old, but eventually the former employer objected that the moral obligation to recompense loyal service was past consideration, and by that time she was no longer in a position to obtain similar employment.\textsuperscript{274} Plaintiff conceded that it was past consideration but argued that the employer was bound under promissory estoppel because she had relied on the promise by retiring.\textsuperscript{275} The court agreed that her detrimental reliance made the employer’s pension promise binding under the doctrine of promissory estoppel.\textsuperscript{276} Judicial attitudes seemed to have evolved to permit a broader use of promissory estoppel one generation after the 1932 publication of \textit{Restatement Second of Contracts} Section 90. The modern availability of promissory estoppel for reliance on moral obligation promises in a commercial context permitted a direct remedy for the reliance induced, rather than for the court to have been compelled to engage in doctrinal machinations in order to obtain a just result.

\textbf{IV. HARM CAUSED BY PAST COHABITATION}

If a cohabitation relationship breaks down, the person in the stronger economic position, often the man, might conclude it would be churlish to not make amends to the woman for harm suffered due to such factors as their accumulated property being in his possession, the career sacrifices she may have made to further his, the possible injury to her reputation, and the reality that she probably will have the burden to rear any illegitimate offspring. The vulnerability of the woman in trusting in the promisor

\begin{itemize}
\item \textsuperscript{270} \textit{Id.} The former probably would have qualified for bargain consideration treatment and the latter for promissory estoppel.
\item \textsuperscript{271} 322 S.W.2d 163, 164 (Mo. Ct. App. 1959).
\item \textsuperscript{272} \textit{Id.} at 164-65.
\item \textsuperscript{273} \textit{Id.} at 166, 169.
\item \textsuperscript{274} \textit{Id.} at 169.
\item \textsuperscript{275} \textit{Id.} at 167. She had not sought work elsewhere after retiring from defendant’s employ at age 57.
\item \textsuperscript{276} \textit{Feinberg}, 322 S.W. 2d at 168-69 (ruling that retirement in reliance on pension promise estopped defendant).
\end{itemize}
is patent. In the early nineteenth century, there was a liberal application of moral obligation ideas to promises that atone for injuries caused by past cohabitation to a woman's reputation and her future prospects.\footnote{277} The ground had been prepared in the preceding century by enforcement of sealed promises to recompense for the harm of past cohabitation.\footnote{278} Despite the fact that a sealed contract generally provided conclusive evidence of consideration, issues of policy and consideration were discussed in the 1786 sealed bond decision \textit{Turner v. Vaughan} in response to the defendant's objections that the consideration was both illegal and past.\footnote{279} In regard to the policy argument, Clive, J., responded: "I am in a Court of Common Law, and not an Ecclesiastical Court."\footnote{280} As to the past consideration objection, Bathurst, J., replied in moral obligation terms, "[w]here a man is bound in honour and conscience, God forbid, that a Court of Law should say the contrary; and wherever it appears that the man is the seducer, the bond is good."\footnote{281} Although the decisiveness of the seal was removed in the early republican days of the United States, the import of sealed past cohabitation promises once being binding, despite doctrinal and policy obstacles, continued to be discussed into the twentieth century.\footnote{282} When state courts cited the sealed promise precedents, even after the seal lost its power, in support of the binding character of past cohabitation promises, they were effectively arguing that the consensual theory provided a ground for enforcement of a defendant's moral obligation promise, notwithstanding the past consideration rule.\footnote{283}

In England, a generation after \textit{Turner}, unsealed promises of indemnity made subsequent to cohabitation were considered. The 1815 English decision \textit{Gibson v. Dickie}, on its facts, is a precursor of modern American decisions that enforce agreements of cohabiting, meretricious spouses in that the couple continued to


\footnote{279. \textit{Turner}, 95 Eng. Rep. at 846-47.}

\footnote{280. \textit{Id.} at 846.}

\footnote{281. \textit{Id.}}

\footnote{282. \textit{See}, e.g., \textit{In re Greene}, 45 F.2d 428, 430 (S.D.N.Y. 1930) (observing presence of sealed cohabitation promise would have been decisive a century before in New York but now only presumptive evidence of consideration); Latham v. Latham, 547 P.2d 144, 146 (Or. 1976). In England, the ancient seal was replaced in 1989 by a recitation that the document was intended as a sealed deed. \textit{Law of Property Act}, c. 34, § 17 (1989) (Eng.); \textit{cf}. Dannells v. United States Nat'l Bank of Portland, 138 P.2d 220, 230-31 (Or. 1943) (stating that just as sealed promise on past cohabitation was formerly binding, so under Oregon statute a written compromise of a claim was "as obligatory as if a seal were affixed").}

\footnote{283. \textit{See} Potter & Son v. Gracie, 58 Ala. 303, 305 (1877); \textit{cf}. Lon L. Fuller, \textit{Consideration and Form}, 41 COLUM. L. REV. 799, 805-06 (1941) (explaining that parties' expressed intention is in essence a function of form); N.Y. GEN. OBLIG. LAW § 5-1105 (McKinney 1963).}
cohabit after they agreed to terms that would cover the possibility of separation.\textsuperscript{284} The defendant raised the policy objection that defendant’s promise operated as an inducement to continue illicit cohabitation, but the court retorted that on the contrary the agreement was really an “inducement to separate” and thereby return to upstanding lives.\textsuperscript{285} The court’s decision expressed no doctrinal concern over the past consideration rule as it held the promise of compensation binding “for the injury done [to] her by their past illicit connection.”\textsuperscript{286} The facts hinted at a bargain of sorts since the life annuity was conditioned on her obligation to remain chaste after separation.\textsuperscript{287} Six years later, in a case of a promise to atone for past cohabitation, the defendant in \textit{Binnington v. Wallis} argued that “not even a moral obligation [existed] to provide for a woman for past cohabitation” because seduction by the defendant was not alleged.\textsuperscript{288} The court picked up on defendant’s comment and hinted at an opening for future plaintiffs when it said, “[t]he declaration is insufficient. It is not averred, that the defendant was the seducer, and there is no authority to shew (sic) that past cohabitating alone, or the ceasing to cohabit in the future is good consideration.”\textsuperscript{289}

Plaintiff’s attorney in the 1842 English decision \textit{Jennings v. Brown} seized upon the suggestion in \textit{Binnington} and alleged seduction on past consideration facts.\textsuperscript{290} The pedantic judge, Baron Parke, said the notion in \textit{Binnington} about the need to allege seduction “[made] no difference,” and then he went further and famously proclaimed that the past cohabitation “was a mere more moral consideration, which is nothing.”\textsuperscript{291} The supportive dictum in \textit{Binnington} fared only a little better in the United States where a few state courts continued to cite it during the nineteenth century for the proposition that a promise was founded upon good consideration when intended as an indemnity for wrong done by past cohabitation.\textsuperscript{292} Despite Parke’s disagreement with \textit{Binnington}, he found the promise in \textit{Jennings} binding against the promisor’s estate on the grounds it was “a matter of bargain, that she is to take care of the child” of their cohabitation and to keep their liaison secret in


286. \textit{Id.} at 685.

287. \textit{Id.} at 684. An unlawful restraint of marriage objection was raised against proviso that payments would cease upon remarriage, but the court rejected it since it was no different than such a condition during widowhood. \textit{Id.} at 684-85.


290. 152 Eng. Rep. 210 (Ex. D. 1842). The defendant argued that cohabitation had not ceased when promise made, but jury found otherwise. \textit{Id.} at 211.


292. \textit{See, e.g.}, Potter & Son v. Gracie, 58 Ala. 303, 305 (1877) (dictum).
exchange for defendant's annuity promise.\textsuperscript{293} Seven years later a bargain again was
found in \textit{Hicks v. Gregory}, despite defendant's objection of past consideration, on
allegations of seduction and past cohabitation.\textsuperscript{294} The bargain consisted of plaintiff's
obligation to not be guilty of "behaving ill, or bringing up [her] child improperly" in
exchange for the annuity.\textsuperscript{295} The strained bargain analysis in \textit{Jennings} is better
explained as the application of the consensual theory to the defendants' promises in
order to prevent injustice. In \textit{Hicks}, Wilde, C. J. emphasized this factor in his interest
"to ascertain the writer's intention" in making the promises.\textsuperscript{296} The judges in these
two cases did seem to be concerned about the unfairness that would result if
defendants did not recompense for the obligations of child rearing.\textsuperscript{297} Perhaps the
anomalous decisions, for that time, were uncommon judicial efforts to discover a
bargain on past cohabitation facts in order to remedy perceived undue advantages of
one class over another.\textsuperscript{298} The plaintiff in \textit{Jennings} was a servant in defendant's
establishment.\textsuperscript{299} The defendant in \textit{Hicks} had been an undergraduate at the
University of Oxford, who ended a four year cohabitation with the plaintiff when he
left Oxford in 1814 not long after the birth of the liaison's illegitimate offspring.\textsuperscript{300}
He explained that his father, obviously a man of means, "never would have done
anything for me, if I continued living with [her]."\textsuperscript{301}

Doctrinal uneasiness grew in England over promises in consideration of past
cohabitation after the decision in \textit{Eastwood v. Kenyon} castigated Mansfield's moral
obligation ideas; the issue came to a head in the 1846 case of \textit{Beaumont v. Reeve}.\textsuperscript{302}
The plaintiff alleged a promise of indemnity for seduction, past cohabitation and
resultant injuries to character and to prospects of livelihood.\textsuperscript{303} Denman, C. J., cited
Parke's dictum critical of the seduction point in \textit{Binnington} and said, "[t]he moral

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\textsuperscript{293} \textit{Jennings}, 152 Eng. Rep. at 212.
\textsuperscript{294} 137 Eng. Rep. 556, 558 (C. P. 1849).
\textsuperscript{295} \textit{Id.} at 557. Williams, J. said he saw only a moral obligation but was relieved majority
saw adequate consideration. \textit{Id.} at 559.
\textsuperscript{296} \textit{Id.} at 559.
\textsuperscript{297} \textit{See id.; Jennings}, 152 Eng. Rep. at 212; cf. \textit{In re Greene}, 45 F.2d 428, 429 (S.D.N.Y.
1930) (citing "doubtful" precedents that suggested illegitimate offspring made a difference).
\textsuperscript{298} In both cases, the promisors honored their promises for decades up to their deaths. As is
typical of so many moral obligation cases, it is the heirs that deny the binding moral obligation. \textit{See}
\textsuperscript{299} \textit{Jennings}, 152 Eng. Rep. at 211.
\textsuperscript{300} \textit{Hicks}, 137 Eng. Rep. at 557.
\textsuperscript{301} \textit{Id.} (stating that subsequent to their break-up, the young man urged plaintiff in a letter
sent from across the Irish Sea: "I would by all means advise you immediately to leave Oxfordshire,
and live in some county where you are not known.").
\textsuperscript{302} 115 Eng. Rep. 958 (K.B. 1846).
\textsuperscript{303} \textit{Id.} at 958. Plaintiff "conceded that a promise ... in consideration of future cohabitation
would be illegal." \textit{Id.} at 959.
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consideration, which alone appears here, cannot support [the] assumpsit.\textsuperscript{304} For precedent, he cited his \textit{Eastwood} opinion which adopted the \textit{Wennall} reporters' note view, that the promise on a moral obligation was not binding if it did not hark back to any previous enforceable legal obligation.\textsuperscript{305} Patteson, J., reinforced Denman by stating that the seduction would not have originally given plaintiff a cause of action.\textsuperscript{306} Although Wightman, J., seemed to express some lingering support for moral obligation,\textsuperscript{307} Denman's forceful opinion effectively terminated actionability on past cohabitation promises in England to this day. While Parke had tried to carefully contain growth in enforcement of promises on past cohabitation facts, Denman pursued the same preemptive strategy he had employed in \textit{Eastwood} to snuff out any residual presence of moral obligation in the English common law of contract.\textsuperscript{308} Once more, any modern extensions of early glimmerings in England of relief on indemnity promises for harm caused by past cohabitation would have to occur in courts in the United States.

American courts had to deal with the same two fundamental doctrinal objections seen in the above English decisions, that promises on past cohabitation were supported by illegal and past consideration. The policy objection has largely been disposed of both as to promises anticipating continuation of an illicit relationship,\textsuperscript{309} now known as a cohabitation agreement of meretricious spouses, and promises related to past cohabitation.\textsuperscript{310} In an 1854 Pennsylvania case, the court stated there was no immorality for a seducer to provide for the "victim of his passions."\textsuperscript{311} Judges perceive no policy problems with promises on past cohabitation since no intention is present to resume the illicit behavior.\textsuperscript{312} Policy problems are usually

\begin{thebibliography}{99}
\bibitem{304} Id.
\bibitem{307} Id. (Wightman said: "I felt some doubt in this case" but then went with the majority.).
\bibitem{308} Id. \textit{But cf} Cooke v. Head, 2 All E.R. 38, 40-41 (C.A. 1972) (holding that a man held title to house in resulting trust for benefit of former cohabitant who had contributed to value of house they planned to live in once married.); Tanner v. Tanner, 3 All Eng. Rep. 776, 779-80 (C.A. 1975) (granting relief in case where man and mistress never intended to marry).
\bibitem{309} See, e.g., Cooper v. Cooper, 17 N.E. 892, 894 (Mass. 1888); Rhodes v. Stone, 17 N.Y.S. 561, 562 (1892) (saying illicit relations were not a part of basis of bargain).
\bibitem{310} See \textit{In re} Greene, 45 F.2d 428, 429 (S.D.N.Y. 1930) (stating that while past cohabitation consists of prohibited past consideration, it was not illegal; however, the court held the, by then, archaic stance that a contract for future cohabitation was illegal.); Donnell v. Stogel, 560 N.Y.S.2d 200, 202-03 (N.Y. App. Div. 1990).
\bibitem{311} Wyant v. Lesher, 23 Pa. 338, 341 (1854) (declaring "[i]t would be a disgrace to our age and generation if the law" did not enforce promises both on past and future cohabitation).
\bibitem{312} See Gibson v. Dickie, 105 Eng. Rep. 684, 685 (K.B. 1815); \textit{Greene}, 45 F.2d at 429; Karoley v. Reid, 269 S.W.2d 322, 326 (Ark. 1954) (finding consideration in agreement to permanently sever illicit relations); \textit{see also} Robbins v. Potter, 93 Mass. 588, 590 (1866) (holding loan obligation incurred during past cohabitation was binding); \textit{Donnell}, 560 N.Y.S.2d at 203.
\end{thebibliography}
absent as well for promises between meretricious spouses, so long as neither past nor future sexual relations are recompensed. The policy concern has been resolved in that the consideration must be for services other than sexual relations. To the argument that enforcement of cohabitation agreements lessens the attractiveness of marriage, a counter argument is that if cohabitation agreements are not enforced, the partner with greater income potential might prefer cohabitation since his assets will not be subject to divorce and inheritance laws. Changing attitudes regarding cohabitation are reflected in modern legislation that has decriminalized cohabitation and adultery, abolished fault divorces, and permitted cohabitation agreements between meretricious spouses. Today, when courts scrutinize cohabitation agreements, the modern context of shifts in customs and in resultant legislative policies are invoked in support of promissory liability.

The second restaters indicated in the black letter text of Section 86 and in its illustration number 3, that promises made in consideration of past cohabitation are not binding under that Section. In re Greene provided the model for that illustration. The written agreement in Greene was between a married man and the (opining that illicit sexual part of the contract can be severed). But cf. Binnington v. Wallis, 106 Eng. Rep. 1074, 1075 (K.B. 1821) (observing that no authority for consideration present in ceasing to cohabit in future).

313. See, e.g., Boot v. Beelen, 480 S.E.2d 267, 269 (Ga. Ct. App. 1997) (distinguishing binding promise to repay debt from any for sex acts); Rhodes, 17 N.Y.S. at 562 (indicating so long as illicit sex is not basis of the bargain); Watts v. Watts, 405 N.W.2d 303, 311 (Wis. 1987) (finding that sex was not a condition of bargain).

314. See Boot, 480 S.E.2d at 269; Rhodes, 17 N.Y.S. at 562; Watts, 405 N.W.2d at 311.

315. See Hewitt v. Hewitt, 394 N.E.2d 1204, 1207-08, 1210, 1211 (Ill. 1979) (claiming that it contravened legislative policy of preserving integrity of marriage as reflected in fault divorce and abolition of common law marriage). The Illinois Supreme Court was operating as though in the nineteenth century; common law marriage had been abolished in 1905, and in 1979 Illinois was one of only three states to require fault proven in divorce. Id at 1210. The intermediate appellate court below in Hewitt saw it differently and argued that the stable family relationship of 15 years and 3 offspring were indicators that the concept of marriage had not been denigrated or discouraged. 380 N.E.2d 454, 460 (Ill. App. Ct. 1978). The Illinois Supreme Court’s comment about abolition of common law marriage would make some sense if it were restricted to barring implied-in-fact contracts. See Morone v. Morone, 413 N.E.2d 1154, 1155 (N.Y. 1980) (underlining New York position that express cohabitation contracts were binding but implied-in-fact agreements were not since inconsistent with abolition of common law marriage).

316. See, e.g., Hewitt, 394 N.E.2d at 1210 (stating that only three states maintain fault divorces); Lynn v. Lynn, 398 A.2d 141, 144 (N.J. Super. Ct. App. Div. 1979) (noting legislation that decriminalizes adultery in New Jersey); Donnell, 560 N.Y.S.2d at 202-03 (indicating that cohabitation is not illegal in New York); Watts, 405 N.W.2d at 311 (concluding that agreements between two people are permitted if the bargain is independent of the illicit relationship).

317. See, e.g., Morone, 413 N.E.2d at 1155, 1156-57; Donnell, 560 N.Y.S.2d at 203; Watts, 405 N.W.2d at 311.


319. See In re Greene, 45 F.2d 428 (S.D.N.Y. 1930); RESTATEMENT (SECOND) OF
woman with whom he had cohabited for several years. The opinion was written by a federal district court sitting in New York in its review of a bankruptcy referee's determination that the agreement was a binding claim against the man's bankrupt estate. In a decision, which reads more like a terse laundry list of scattered notions than an appellate opinion, the district court ruled that the agreement failed on the grounds of past consideration. The opinion cited no common law authority, but was content to cite as the sole authority the conservative view of the past consideration rule espoused in Williston's treatise. The Greene court characterized those decisions as "doubtful," which had found seduction or the presence of illegitimate offspring to be relevant factors. Nevertheless, the court proceeded to apply those factors to the facts as a means of justifying its holding. Since there were neither offspring nor a seduction, the court ruled no past wrong was committed for which the bankrupt estate owed claimant "expiation." In the end, the agreement was not binding since it "must be supported by some consideration other than past intercourse." The Greene opinion arguably left open several possible bases for finding a promise binding on past cohabitation. What if there were a seduction, illegitimate offspring, or consideration other than past sexual intercourse? On the last suggestion, the 1954 Arkansas decision Karoly v. Reid specifically distinguished its facts from the Greene decision and enforced a promise on past cohabitation supported by consideration other than past sexual intercourse. The presence of an illegitimate child born of the past union may heighten the moral obligation enough to make the difference for enforcement of a putative father's promise of payments to his former cohabitant; the burden has been foisted upon her, and the father will be both relieved of any obligation to care for the child and assured

CONTRACTS § 86 reporter's cmt. a (1981).
320. Greene, 45 F.2d at 428.
321. Id.
322. Id. at 429.
323. Id. (citing 15 WILLISTON, supra note 246, § 1745).
325. Greene, 45 F.2d at 429.
326. Id. 428-29 (perceiving woman to not be a victim since over 30 years old and knew that man was married); cf. Potter & Son v. Gracie, 58 Ala. 303, 305 (1877) (stating in dictum. "[a] contract or conveyance, in consideration of past cohabitation, intended or regarded as reparation, or indemnity for the wrong done, is treated at common law as founded on good consideration.").
327. Greene, 45 F.2d at 429.
328. 269 S.W.2d 322, 325-26 (Ark. 1954). Consideration other than past sexual relations could probably have been found in Greene as well.
that his offspring will receive good care. Moreover, it is probable that a part of what the mother receives from her former cohabitor will be applied for the child's benefit. A promise directed solely for maintenance of illegitimate children has been enforced under the moral obligation principle for centuries. Today, a putative father is statutorily obliged to pay maintenance, and a promise to pay is generally binding without consideration. The opinion in Greene does not so obviously close the door on promises on past cohabitation as the second restaters suggested.

More recently, several courts in New York have suggested how promises in consideration of past cohabitation could be binding. In the 1988 decision *Kastil v. Carro*, after a ten year sexual relationship had ended between a firm's bookkeeper and a partner of the firm, he orally promised her, in consideration of past services, payments of $5,000 per month until she found another job. The past services were said to include social companionship and acting as a surrogate mother for his disabled daughter. The court held against her because New York precedent says illicit sex cannot supply consideration. The precedents cited concerned promises of meretricious spouses in expectation of future illicit sexual relations; this could be interpreted to mean that an agreement could have been binding, as it is for meretricious spousal agreements, if consideration other than sexual relations were present. The court said it was impossible to tell whether the services were gratuitous but did offer that, had the agreement been in writing, it would have been binding under statutory law in New York.

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329. *See Hicks*, 137 Eng. Rep. at 556, 559; *Jennings*, 152 Eng. Rep. at 212; *Hargoves v. Freeman*, 12 Ga. 342, 349 (1852) (concerning promise to pay mother of illegitimate so much a month and also delivery of a note for benefit of child); *see also Wyant v. Lesher*, 23 Pa. 338, 341 (1854) (stating that promise to marry woman defendant had cohabited with and impregnated was for benefit of the mother and her child). A putative father is generally bound in law to support an illegitimate child today, and his promise to pay maintenance is usually binding either without consideration or under moral obligation since the statutory remedy is not an exclusive remedy. *See*, e.g., *Franklin v. Congelosi*, 273 A.2d 291, 293 (Conn. 1970).


332. *See Franklin*, 273 A.2d at 293 (indicating that statute is not exclusive remedy).


334. *Id.*

335. *Id.* at 64. A fundamental distinction between *Kastil* and cohabitation agreement cases generally, which should have precluded plaintiff in any case, was that it appeared the parties had long-term sexual relations without cohabitation. *Id.*


the role the seal had performed prior to the nineteenth century. Thus, a plaintiff in New York has two potential routes to success by either producing a written agreement or by showing consideration other than sexual relations. As a postscript to Kastil, the defendant stopped making payments only after two years had elapsed, at which time she still had not found a job; possibly an underlying lack of good faith on her part was on the judges' minds. A woman's lack of good faith performance likewise seemed to have been at play in a 1995 New York conversion action brought against plaintiff's former cohabitant for what appears to be an abuse of discretion in her manner of exercising a right under the past cohabitation agreement. She exercised her right to choose household furnishings for herself by taking substantially all of the furnishings in the former place of cohabitation still occupied by plaintiff. After stating these facts, the court did not address the good faith issue, but instead held against the woman because her promised right to choose was supported only by past sexual relations.

The 1990 New York past cohabitation agreement case Donnell v. Stogel involved a different use of precedents on meretricious spousal agreements. A couple cohabited for four years and during that time the woman lost her job as a result of the cohabitation. Upon the break-up of the relationship, plaintiff and defendant entered into an agreement for him to make payments to her for three to four years until she found employment; the stated consideration was for living together as husband and wife and for the contributions she made toward the well-being of his business. The trial court refused enforcement on the policy ground that the agreement facilitated adultery and that the agreement was not severable since the main objective was to compensate for cohabitation. The appellate court disagreed because the main objective was to compensate for the plaintiff's assistance to defendant's business rather than for cohabitation. The court reasoned, that even if it were in consideration of cohabitation, cohabitation was no longer illegal in New York.

339. Kastil, 536 N.Y.S.2d at 64.
341. Id. at 966 (indicating that just prior to break-up plaintiff, a physician, and defendant had acquired furnishings when they moved to New York so he could set up his practice).
342. Id. at 967 (expressing both policy concerns, since he was married through most of the cohabitation, and past consideration concerns, since contract wording specified promise was in light of past cohabitation).
344. Id. at 201.
345. Id. (noting that she contributed to defendant’s business by providing business advice and by working without pay in development of a new product for his business).
346. Id. at 202.
347. Id. at 202-03; see Mitchell v. Fish, 134 S.W. 940, 942 (Ark. 1911) (stating that right to fruits of joint venture between cohabitants was collateral to, and not tainted by, illegal relations).
and, in this case the cohabitation part could be severed from the agreement.\textsuperscript{348} Donnell was analyzed in the same manner as a binding agreement made between meretricious spouses who anticipated continuation of the cohabitation.\textsuperscript{349} The cited authorities consisted of decisions enforcing the portion of meretricious spouses' agreements supported by services other than sexual relations.\textsuperscript{350} The decision in Donnell v. Stogel would have lent stronger support for enforcement of past cohabitation promises for use in later cases had the court openly declared that an analogy was being drawn to meretricious spousal agreements as a means of changing the law.\textsuperscript{351} From a policy perspective, the use of precedents concerning meretricious spousal agreements on past cohabitation promises makes sense because the parties' consensual goal of making a fair division of property between cohabitants is shared by both categories of cohabitation agreements. The fact of cohabitation is of course identical in both, and they were both subject to policy objections in more traditional times,\textsuperscript{352} but the meretricious spousal agreement has a leg up in that there are no past consideration problems.

Although the actual facts in Donnell involved a promise in consideration of past cohabitation and of past assistance in business, the court made no reference whatsoever to the past consideration rule issue.\textsuperscript{353} For decisions that deal with these realities in the facts, it has already been mentioned that one basis for enforcement of a promise on past cohabitation is to find existence of some other consideration which is not past.\textsuperscript{354} An alternative approach, which should apply to certain past cohabitation facts, is to bring a cause of action for an implied-in-fact contract created during the meretricious relationship. This device is thought of as a method of enforcement of an implied meretricious spousal agreement,\textsuperscript{355} but in effect it is an action brought after the breakdown of the relationship for what happened during the past cohabitation. The use of an implied-in-fact contract action eliminates the past consideration rule

\begin{itemize}
\item \textsuperscript{348} Donnell, 560 N.Y.S.2d at 202-03.
\item \textsuperscript{349} Id.
\item \textsuperscript{350} Morone v. Morone, 413 N.E.2d 1154, 1155 (N.Y. 1980); In re Gorden's Estate, 168 N.E.2d 239, 240-41 (N.Y. 1960).
\item \textsuperscript{351} See, e.g., Karoley v. Reid, 269 S.W.2d 322, 325 (Ark. 1954) (drawing analogy to meretricious spousal agreement).
\item \textsuperscript{352} However, since future extramarital sexual relations were not contemplated, the court was more favorable to the promise for past consideration. \textit{Id}. at 323.
\item \textsuperscript{353} 560 N.Y.S.2d at 200.
\item \textsuperscript{354} See discussion supra text accompanying notes 329-33.
\item \textsuperscript{355} See, e.g., Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976) (commenting that express contract or restitution can sometimes be viable theories as well); Watts v. Watts, 405 N.W.2d 303, 312-13 (Wis. 1987); Steffes v. Steffes, 290 N.W.2d 697, 704, 706-07 (Wis. 1980); cf. \textit{In re} Estate of Palmen, 588 N.W.2d 493, 496 (Minn. 1999) (ordering restitution in circumstances close to implied-in-fact). In an 1866 opinion, past consideration bar and policy objections were overcome by artful suggestion that: "[i]t was possible that this promise was made from time to time, as she advanced the money, without any agreement or understanding that the cohabitation should continue." Robbins v. Potter, 11 Allen 588, 590 (Mass. 1866).
\end{itemize}
problem entirely. These implied-in-fact actions are brought because no express promise of compensation was ever made, neither during the meretricious relationship nor after the break-up. More specifically, if a promise of compensation were extended after a break-up, plaintiff's attorney might still be well advised to bring an implied-in-fact action if the evidence is there, rather than suing on the past cohabitation agreement, because of the thorny problems presented by the past consideration rule. It would seem that the potential to bring an implied-in-fact action would be present with some frequency because in actions on either an implied-in-fact contract or a past cohabitation agreement, there is the parallel need to prove that an expectation of compensation was present when the non-sexual services were rendered during cohabitation. An action brought on an implied-in-fact, meretricious spousal contract could be an effective tool for plaintiffs to utilize subsequent to the breakdown of a cohabitation relationship in order to sidestep the past consideration rule. On the facts of Donnell, the plaintiff's business services could reasonably be considered a basis for an implied-in-fact contract claim. Her stated contributions to the general well-being of defendant's business are probably too amorphous, but her work without salary for the development of a particular type of footwear for defendant's shoe business appears ripe for an implied-in-fact contract action. As mentioned before, some states enforce implied-in-fact, meretricious spousal contracts, but unfortunately for plaintiff, New York courts will only enforce express, meretricious spousal agreements.

Courts outside New York have cited decisions on meretricious spousal agreements as authority in support of past cohabitation promises as well. In the past cohabitation promise case Karoley, an Arkansas court drew an analogy to the 1911 Arkansas decision Mitchell v. Fish, which enforced a meretricious spousal agreement, in support of enforcement of an agreement of former cohabitants to equitably divide their interests in a jointly-acquired residence. The use of the analogy constituted an open declaration that the factual and policy similarities justified enforcement of such property rights agreements, whether they are made during or subsequent to

356. See Steffes, 290 N.W.2d at 706.
357. Donnell, 560 N.Y.S.2d at 201.
358. See Rhodes v. Stone, 17 N.Y.S. 561, 562 (1892) (ruling that an express promise could be binding but implied could not be); Morone v. Morone, 413 N.E.2d 1154, 1155 (N.Y. 1980) (stating that implied-in-fact contract is not binding here because it's so amorphous in this context and it is against the policy of ending common law marriage in New York); In re Gorden's Estate, 168 N.E.2d at 241 (concluding that large number of hours she put into defendant's business would normally be gratuitously performed by one living like a wife, though an express promise could overcome this inference).
359. 269 S.W.2d 322, 325-26 (Ark. 1954) (stating that plaintiff deeded over interest in the house to defendant in exchange for a promise of monthly payments); Mitchell v. Fish, 134 S.W. 940, 941-42 (Ark. 1911) (involving agreement made during nine year cohabitation to divide proceeds of sale of residence they bought together).
Another feature of the opinion in *Mitchell*, which was adopted in the *Karoley* opinion, was that one joint venturer ought to account to the other for the fruits of their contract irrespective of the illicit nature of the relationship that generated the contract. The common law technique of analogy in *Karoley* is doctrinally preferable to the approach of the New York court in *Donnell* of remaining silent on the difference between the circumstances of the precedent cited. The analogy makes it clear that growth in the law is being effectuated. The Arkansas court said, "[t]here is considerable division of authority on the question of the validity of contracts in consideration of past illicit relations" and further that "past illicit relations between the parties to a contract will not invalidate it, if it is otherwise supported by valuable consideration." Here, the court found the agreement otherwise supported by consideration in three respects: in the parties' agreement to permanently sever illicit relations, in the separate property plaintiff contributed, and in the removal of any cloud on defendant's title to the residence thereafter. The court's willingness to look at factors untainted by past sexual relations to find a bargain in an agreement on past cohabitation in order to obtain a just result is reminiscent of English judicial experimentation with bargain notions in a couple of past cohabitation cases in the 1840s. Courts of law and equity are more inclined today to find consideration to support past cohabitation agreements, in elements other than sexual relations or past consideration, when the equities favor the promisee. For example, in *Karoley*, the plaintiff had contributed to the acquisition of the residence during their eleven years of cohabitation and after their break-up had deeded over her interest to defendant in exchange for his promise to make monthly payments to her.

The duty of a former cohabitant in possession of property that was jointly accumulated to account to the other cohabitant, as required in the Arkansas cases *Mitchell* and *Karoley*, highlights an issue of fairness often present in decisions on promises in consideration of past cohabitation. The *Karoley* court obtained a balanced result by ruling that the duty to account for the fruits of their joint venture was collateral to, and untainted by, past sexual relations and thus not barred by the

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360. *Karoley*, 269 S.W.2d at 325 (emphasizing that division of assets is collateral to sexual relations).
361. *Id.; Mitchell*, 134 S.W. at 942.
363. *Karoley*, 269 S.W.2d at 324-25.
364. *Id. at 326. But cf: Binnington v. Wallis*, 106 Eng. Rep. 1074, 1075 (K.B. 1821) (stating that "no authority to shew (sic) that... ceasing to cohabit in future is a good consideration").
365. Because English courts concluded during the 1840s that a moral obligation could not support a subsequent agreement, these two decisions reached for bargain notions in order to obtain a fair result. *See Jennings v. Brown*, 152 Eng. Rep. 210, 212 (Ex. 1842); *Hicks v. Gregory*, 137 Eng. Rep. 556, 559 (C.P. 1849).
366. *Karoley*, 269 S.W.2d at 323-24, 326.
367. *Id. at 325; Mitchell*, 134 S.W. at 942.
past consideration rule. 368 Too often when cohabitation ends, one of the parties is in possession of property interests, which in fairness, partially belong to the other party. In 1975, an Oregon court said in a dispute over a meretricious spousal agreement that the old principles had allowed the man to keep jointly accumulated property at the end of cohabitation. 369 In order to correct that injustice, the court said it would enforce their meretricious spousal agreement since it was supported by consideration other than sexual relations. 370 In 1987, a Wisconsin court observed that a court’s refusal to enforce cohabitants’ implied-in-fact agreement would allow the defendant to keep most of the assets when he was no less guilty of meretricious behavior. 371 Another Wisconsin court applied that notion against the promisor’s heirs as well, who otherwise would be unjustly enriched despite the fact that the deceased man “was just as much a part of the illicit relationship as [she] was.” 372 In 1999, restitution was granted in In re Estate of Palmen on behalf of a woman who contributed her cash and services to construction of the log cabin domicile of the cohabitants. 373 The court said a Minnesota statute requiring an agreement between meretricious spouses to be in writing did not apply because the restitution of her property interest did not relate to sexual relations. 374 If cohabitation agreements are not found binding in these instances, the defendant receives a windfall at plaintiff’s expense; creating an inequitable result that would be averted by a married person who could obtain protection under legislation covering property rights in the event of divorce or death. 375

As a matter of policy, the realities of modern patterns of cohabitation ought to be reflected in judicial rulings regarding when it is appropriate to rule that the past consideration rule operates as a bar to recovery. As a New York court put it a generation ago in a dispute over a meretricious spousal agreement: “development of legal rules governing unmarried couples has quickened in recent years with the

368. Karoley, 269 S.W.2d at 325-26; see Mitchell, 134 S.W. at 941-42.
370. Id. at 146-47 (declaring that court was abandoning “dubious reasoning” formerly used to protect woman’s interest).
371. Watts v. Watts, 405 N.W.2d 303, 311 (Wis. 1987) (rejecting policy objection since other consideration present and enforcing implied-in-fact contract for division of property jointly-accumulated over twelve year cohabitation which generated two children as well); see Boot v. Beelen, 480 S.E.2d 267, 269 (Ga. Ct. App. 1997) (holding binding the promise made during cohabitation, and repeated subsequent thereto, to repay plaintiff for loan made to defendant during cohabitation).
373. In re Estate of Palmen, 588 N.W.2d 493, 496 (Minn. 1999) (saying she should recover for her own contributions to cabin, which was not a claim based past sexual relations).
374. Id. at 495-96; MINN. STAT. §§ 513.075, 513.076 (1988) (prescribing that written agreement required if sexual relations contemplated).
375. See Watts, 405 N.W.2d at 308 (rejecting proposition that marriage dissolution act applied to cohabitants, but enforcing meretricious spouses agreement to divide property).
relaxation of social customs.\textsuperscript{376} Prior to the 1970s, long-term sexual relations usually occurred within a marital relationship.\textsuperscript{377} At common law, long-term relationships deviating from the norm were governed by common law marriage rules that provided financial protection for the weaker party, often the woman, at divorce or death.\textsuperscript{378} Changes in societal attitudes about the institution of marriage have resulted in higher divorce rates and an increase in cohabitation arrangements.\textsuperscript{379} Resulting reforms have provided protection for couples cohabiting under meretricious spousal agreements,\textsuperscript{380} but the continuing strict application of the past consideration rule offers little solace to a worthy promisee who claims under an agreement made subsequent to cohabitation. Policy positions may shift regarding promises in consideration of future cohabitation, but archaic principles imbedded in the doctrine of consideration live on. Today it appears that the law better protects those who harbor less hope about the permanency of the cohabitation relationship, and so plan for its possible breakdown, through a, now binding, meretricious spousal agreement. In effect, cohabitants who may have higher hopes and ideals regarding the staying power of their relationship and do not enter into such agreement while living as meretricious spouses are left out in the cold if the relationship breaks down. Modern law has inverted the rules from early in the nineteenth century when an agreement subsequent to a permanent termination of sexual relations could be enforced, while agreements that induced future cohabitation were not binding.\textsuperscript{381} It is overly doctrinal and unfair to say that a cohabitation that continued for, say, only a month after a meretricious spousal agreement was made is binding, but an agreement made after the end of a long-term cohabitation is a mere \textit{nudum pactum}.\textsuperscript{382} The inequities

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\item \textsuperscript{376} Morone, 407 N.E.2d at 1156; see Watts, 405 N.W.2d at 311 (enforcing meretricious spousal agreement in light of current community mores, the numbers of cohabitants, and decriminalization of cohabitation).
\item \textsuperscript{378} Cf. Hewitt v. Hewitt, 394 N.E.2d 1204, 1211 (Ill. 1979) (asserting that at the apex of recognition of common law marriage in nineteenth century, it was disfavored nonetheless because of chance of perjury and the weakening of marriage).
\item \textsuperscript{382} See Holsomback v. Caldwell, 128 S.E.2d 47, 49 (Ga. 1962).
\end{itemize}
are manifest in the latter situation for the weaker party if she sacrificed her own professional growth in support of the other's worldly successes, is not in possession of the accumulated assets, and may also be surrounded by illegitimate offspring of the union. A few states overcome the past consideration rule through legislation permitting enforcement of these consensual past cohabitation agreements by effectively replacing the ancient seal with a signed writing. Some American courts have been imaginative in devising equitable solutions consistent with the consensual theory through the common law devices of analogy to binding meretricious spousal agreements, express bargains grounded on consideration other than sexual relations, implied-in-fact contracts, and restitution.

V. INJURY SUFFERED BY RESCUER

Although this category involves a narrow circumstance, the leading decision here is one of the most widely invoked moral obligation cases in the case law and is often cited in factual contexts far afield from heroic rescues. In the much-discussed 1935 Alabama decision *Webb v. McGowin*, the plaintiff was permanently disabled when he jumped from an upper floor of a lumber mill in order to cause a heavy seventy-five pound wood block to miss a person below, thereby averting serious harm or death to the rescued person. The rescued person promised an annuity for care and maintenance during the remaining life of the disabled rescuer, who was "badly crippled for life and rendered unable to do physical or mental labor." The promisor honored his promise for nine years, but after his death his executor refused to continue what the estate argued was a mere generosity. The Alabama appellate court found the moral obligation promise worthy of enforcement, and, because of the prevailing influence of the conventional moral obligation principle, the court endeavored to position the facts in its rationale under the material benefit

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384. See *Karoley v. Reid*, 269 S.W. 2d 322, 326 (Ark. 1954).


386. *Webb*, 168 So. at 197. Since Webb was following ordinary work procedures in pushing the wood block from the upper floor, the promisor was arguably negligent to walk underneath without looking. New York decisions have permitted recovery in tort in the absence of a promise, when the negligence of the rescued person placed him in a dangerous position and foreseeably invited rescue. See *Talbert v. Talbert*, 199 N.Y.S.2d 212, 215, 216 (N.Y. Sup. Ct. 1960); *Webb*, 168 So. at 196; cf. *Carney v. Buyea*, 65 N.Y.S.2d 902, 908 (N.Y. App. Div. 1946) (stating that when defendant created peril within view of bystander, defendant committed wrong toward resuer injured in acting on "meritorious impulse to save life").

387. *Id.*
Five years earlier, the lack of a benefit to the promisor did not deter an Ohio court in *State ex rel. Morgan v. Rusk* from enforcement of a city's subsequent recognition of the community's sense of moral obligation through an award to the heroic rescuer of several people trapped in a gaseous tunnel. Public authorities felt a moral responsibility because the police had asked the plaintiff to risk his life in attempting a rescue with the use of his unproven gas mask invention.

The Alabama court in *Webb* found authority in an analogy to enforcement of a subsequent promise to pay for a physician's lifesaving emergency treatment of an insensible person. This analogy was drawn from a natural offshoot of the *Style* instigating strain of the moral obligation principle for emergency benefits received by a person who subsequently promised recompense. Since the *Restatement of Restitution* was not published until two years later, the court might not have been aware that many common law jurisdictions in the United States were granting restitution, in the absence of a promise, to a physician who rendered emergency treatment to an insensible person. Assuming for a moment, however, that Alabama would not have adopted that restitutionary line, the analogy between the physician's treatment and the *Webb* facts is apt in the respect that in both cases, the volunteer provided emergency services to a person in a vulnerable position when bargaining was out of the question. Yet this fact situation is by no means commensurate with the *Style* strain, since a physician as a professional, though acting kindly, performs services in expectation of compensation. Moreover, no bodily harm came to the physician in the *Style* category of cases. The plaintiff in *Webb* was not a professional rescuer; nevertheless, the grievous bodily harm to the rescuer made the difference to allow an extension of the law. The court granted recovery because of the admixture of acute harm and benefit. The Alabama court said that "McGowin

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389. *State ex rel. Morgan v. Rusk*, 174 N.E. 142, 143 (Ohio Ct. App. 1930) (involving wide community interest in plaintiff's heroic use of his gas mask invention in rescue). The Ohio court said the city had the power to pass ordinance "which there was a moral obligation on their part to pay." *Id.*


394. *See Webb*, 168 So. at 196.


396. *Id.*


398. *Id.* at 198.
was benefited. Appellant was injured. Benefit to the promisor or injury to the promisee is a sufficient legal consideration for the promisor's agreement to pay.\textsuperscript{399} The Alabama Supreme Court denied \textit{certiorari} but thought it important to make clear that it agreed with the intermediate appellate court.\textsuperscript{400} The Alabama Supreme Court said that "[t]he reason is emphasized when the compensation is not only for the benefits which promisor received, but also for the injuries either to the property or person of the promisee by reason of the service rendered."\textsuperscript{401} \textit{Webb} was an extension of cases permitting recovery on a restitutionary promise for a benefit received to cover a restitutionary promise of indemnification.\textsuperscript{402} Although the black letter text of Section 86 did not depart from the conventional focus on benefit received, the reporter's note to Section 86 approved of the \textit{Webb} decision and in its illustration number seven, based on \textit{Webb}, it highlighted the harm suffered by the rescuer.\textsuperscript{403}

The conventional analysis of \textit{Webb} as simply a case of a binding promise to compensate for unjust enrichment misses the mark. On the contrary, this is not an unjust enrichment case at all since there is nothing unjust about being rescued. Certainly the rescued person benefited from the plaintiff's heroism, but query whether the court would have enforced the life annuity promise against the promisor's estate if the rescuer had not been severely disabled.\textsuperscript{404} It seems highly unlikely. The heroic act put the rescuer at the mercy of the good graces of the promisor, and the promise was supported in law by the disability suffered on behalf of the promisor. Moreover, would such a valuable reward have been promised if the

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\item[399.] \textit{Id.} at 198 (emphasis added). \textit{See 1A Corbin, supra} note 4, § 231 (saying \textit{Webb} case involved physical detriment to rescuer and like benefit to employer). A civilian jurisdiction might grant restitution in such a case in the absence of a promise. \textit{See John P. Dawson, Negotiorum Gestion: The Altruistic Intermeddler, 74 Harv. L. Rev. 1073, 1108-112 (1961) (discussing German court's grant of restitution in form of annuity to widow of rescuer who drowned while keeping woman afloat until help arrived).}
\item[400.] \textit{Webb}, 168 So. at 200.
\item[401.] \textit{Id.} (emphasis added).
\item[403.] \textit{Restatement (Second) of Contracts} § 86 emt. d, illus. 7 (1981).
\item[404.] Illustration number 7 to Section 86 is based on the \textit{Webb v. McGowin} decision. \textit{Restatement Second of Contracts} § 86 illus. 7 (1981). The drafters did not try to pose the illustration as solely an enrichment case; the phrasing of the illustration highlights the injury to the rescuer as much as the benefit to the rescued. \textit{Id. Doty v. Wilson} provides another example of a court bending over backwards to emphasize receipt of a material benefit, to the exclusion of plaintiff's harm, when the facts make it obvious that the moral obligation promise was made only when defendant made aware of loss incurred by plaintiff. \textit{Doty v. Wilson, 14 Johns. 378, 382-83 (N.Y. 1817) (involving plaintiff-sheriff who freed deadbeat defendant-debtor from prison and later sheriff was compelled to pay defendant's debt due to wrongful release of debtor). See also Jean F. Powers, Rethinking Moral Obligation as a Basis for Contract Recovery, 54 Me. L. Rev. 1, 22 (2002) (arguing that enrichment to McGowin would not have been unjust if Webb had not been injured).}
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rescuer had not suffered serious injury?\textsuperscript{405} The motive and intent behind the promise are relevant in the determination of actionability.\textsuperscript{406} Instead of trying to force these facts into the receipt of benefit formula, the focus ought to be on whether the community finds McGowin’s promise to indemnify the injured rescuer worthy of enforcement. Within a decade after the Webb decision, a North Carolina court came to the opposite conclusion on similar facts,\textsuperscript{407} but such a ruling seems unlikely today since widespread support exists, at least for the outcome, in the now leading decision in Webb.\textsuperscript{408} This type of indemnity promise does not raise the objections germane to the past consideration rule because officiousness is not a concern in such a rescue;\textsuperscript{409} furthermore, no time was available for gratuitous intent to form, nor is the normal degree of proof of compensation expectations required once the promise is made.\textsuperscript{410} The frequent citations of Webb in cases with facts not remotely similar would appear to be an instinctive expression of strong community support for the application of the moral obligation principle to a broader set of circumstances than just the conventional exception for promisor’s receipt of a benefit.\textsuperscript{411}

VI. CONCLUSION

The benefit-based scope of the conventional moral obligation principle notwithstanding, American courts have held moral obligation promises binding for indemnification of wrongs done and harm suffered in a variety of contexts involving cooperative relationships. Decisions in support of this broader reach of the moral obligation principle have appeared continuously in the case reports since the early nineteenth century. Courts have held promises binding for harm caused in such interdependent circumstances as contractual, fiduciary, reliance-based, and cohabitational relationships and in cases of rescues wherein community expectations, as reflected in a myriad of court decisions, are that duties of cooperation and good faith should be encouraged and enforced when moral obligations are voluntarily

\textsuperscript{405} Cf. Dawson, supra note 399, at 1108-112 (discussing German restitution case).

\textsuperscript{406} See Thel & Yorio, supra note 8, at 1048-52, 1075-79, 1100-101 (documenting argument that moral obligation remedy is based on the promise rather than on restitution of benefit).

\textsuperscript{407} Harrington v. Taylor, 36 S.E.2d 227 (N.C. 1945) (indicating plaintiff suffered serious harm to her hand in saving promisor from deadly blow). The facts do differ from Webb v. McGowin in that Webb’s disability was total; yet, the defendant in Harrington, a wife beater, was a less sympathetic figure. In the end, the outcome in Harrington is indefensible today in light of the moral obligation the community widely perceives to be binding.

\textsuperscript{408} See RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. d, illus. 7 (1981).

\textsuperscript{409} See State ex rel. Morgan v. Rusk, 174 N.E. 142, 143 (Ohio Ct. App. 1930) (saying that not officious because police requested him to try a rescue with his new gas mask).

\textsuperscript{410} But cf. Harrington, 36 S.E.2d at 227 (stating that “a humanitarian act of this kind, voluntarily performed, is not such consideration as would entitle her to recover at law.”).

\textsuperscript{411} Cf. Henderson, supra note 16, at 1160 (complaining that rare rescue case facts have been inappropriately generalized to all moral obligation cases).
In contrast to the wariness attendant to the marketplace ethic of arms-length relations, in instances of cooperation and trust, reasonable expectations are that a trust will not be broken and if it is, a subsequent indemnity promise ought to be binding.

Common law courts have granted this strain of moral obligation relief in a variety of contexts when the wrong of one party to a cooperative relationship has caused harm to another party who has let his or her guard down. Modifications to formed contracts have been ruled binding when it is perceived unfair to demand strict adherence to the preexisting duty rule in cases of unfairness caused by unanticipated circumstances and in employment contracts, where an employer’s promise to pay a retroactive bonus for extended, loyal service has been ruled binding when past underpayment of an employee, or other mistreatment, motivated the modification promise. When contract obligations are not performed diligently in contracts entailing fiduciary duties, as those owed by one partner to another or by an attorney to a client, moral obligation promises to make amends have been held binding. In cases of induced reliance harm suffered, subsequent moral obligation promises to indemnify have been enforced as well. Moral obligation promises have also been enforced to compensate for injuries incurred in the fact-specific cases of past cohabitation and heroic rescue.

Enforcement of moral obligation promises engendered by harm that the promisor caused to a vulnerable party does not put the moral obligation principle on a slippery slope leading to a sprawling notion without defined boundaries. These promises arise in the contextual confines of cooperative relations wherein community expectations are that indemnification ought to be given for harm caused in acting in bad faith toward promisee, notwithstanding the absence of a right to restitution or a breach of a tort or contract duty. Judicial relief from harm endured has been granted within the boundaries of relations of confidence and trust existing after a contract has been formed, a fiduciary duty has been created, reliance has been induced, a period of cohabitation has reached an end, or a rescue has been performed. Judicial rulings in past cases enforcing moral obligation promises, in order to prevent injustice in such circumstances, supply grounds for courts to draw from when fashioning equitable solutions under this sub-category of the moral obligation principle.

413. See discussion supra pp. 15-16.
414. See discussion supra pp. 10-12.
415. See discussion supra pp. 17-19.
416. See discussion supra pp. 28-30.
417. See discussion supra pp. 19-21.
418. See discussion supra pp. 74-76, 89-91.