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# *Allegheny College Revisited: Cardozo, Consideration, and Formalism in Context*

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## INTRODUCTION

*Allegheny College v. Chautauqua County Bank*<sup>1</sup> is one of those chestnuts of contract law that almost everyone teaches even though it is not obvious why. The case involves a promise to make a gift to a college and a request that the gift be memorialized in the name of the donor. After making a partial payment early, the donor had a change of heart and did not wish to pay the balance. Upon her death, the college sued her estate and won despite the objection that the promise was unsupported by consideration and therefore unenforceable. The issue presented in the case is very narrow and is, in any event, now moot in those jurisdictions that follow the Second Restatement's position on charitable subscriptions.<sup>2</sup> Two reasons combine to explain the case's current status. First, Judge (later Justice) Cardozo wrote the opinion in characteristically memorable language. Second, his opinion discusses consideration and promissory estoppel at a time (and in influential New York) when both doctrines were in flux. Even if the holding of the case itself is narrow, its author, time, and place are thought to make it important historical reading for those who are interested in twentieth century contract doctrine.

That said, almost everyone complains about the opinion, despite (or in some cases, perhaps because of) its illustrious author. Those casebooks that use *Allegheny College*, and most do,<sup>3</sup> always place it in the promissory estoppel section. This evokes the common complaint that the case probably was not decided on promissory estoppel grounds and its reasoning on those grounds is suspect, whatever it purports to hold. At the very least, despite the occasional memorable phrase, the decision is usually taken not to be one of Cardozo's finer moments<sup>4</sup> and can be

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<sup>1</sup> *Allegheny Coll. v. Nat'l Chautauqua County Bank*, 159 N.E. 173 (N.Y. 1927).

<sup>2</sup> "A charitable subscription . . . is binding . . . without proof that the promise induced action or forbearance." RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (1981).

<sup>3</sup> See, e.g., RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* 709 (3d ed. 2003); BRIAN A. BLUM & AMY C. BUSHAW, *CONTRACTS: CASES, DISCUSSION, AND PROBLEMS* 252 (2003); THOMAS D. CRANDALL & DOUGLAS J. WHALEY, *CASES, PROBLEMS, AND MATERIALS ON CONTRACTS* 211 (3d ed. 1999); JOHN P. DAWSON ET AL., *CONTRACTS* 247 (8th ed. 2003); FRIEDRICH KESSLER ET AL., *CONTRACTS: CASES AND MATERIALS* 501 (3d ed. 1986); CHARLES L. KNAPP ET AL., *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 85 (5th ed. 2003); JOHN EDWARD MURRAY, JR., *CONTRACTS: CASES AND MATERIALS* 38 (5th ed. 2001); ROBERT E. SCOTT & JODY S. KRAUS, *CONTRACT LAW AND THEORY* 193 (rev. 3d ed. 2002).

<sup>4</sup> Richard Posner, for example, calls it "too clever by half." RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 14 (1990).

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confusing for students and “exasperating” for contracts teachers.<sup>5</sup> The opinion has further drawn criticism from some of the most famous contracts scholars of the twentieth century, and about once a decade a different scholar tries to explain the decision anew.

In this Article I will argue that previous debates about this case have been on the wrong track. I will not only defend Cardozo’s opinion — something almost no one has done outright — but I will also go so far as to argue that the opinion teaches a larger lesson. To make my case, I will argue that the opinion has been maligned because scholars have failed to appreciate what sort of claim Cardozo’s opinion makes. Most scholarly treatment of the case has focused on his discussion of consideration and its relation to promissory estoppel. In particular, the puzzle thought to be posed in the case concerns whether the opinion rules in favor of Allegheny College on the doctrine of promissory estoppel or on the doctrine of consideration. Subsidiary questions concern how the two relate to one another and whether Cardozo was intellectually dishonest about the grounds for his decision.

However, those are not the best questions to ask about *Allegheny College*. In fact, a close reading will answer them fairly easily. Cardozo’s opinion decides the case based on the doctrine of consideration — this much is generally accepted these days, though usually tentatively. But what is not appreciated is that, as a case of consideration, it is relatively easy. Or rather, what is controversial about the finding of consideration is *not* what scholars have taken to be the tough issue: was value given for the promise? Value was given, according to Cardozo. The tough issue for him concerned whether the benefactor’s promise was given *in order to induce that value*. If Cardozo’s opinion stretches any doctrine, it is on the issue of inducement, which in turn raises an issue of offer and acceptance. Could the promise in question reasonably be construed as an offer to give money *in exchange for* (at least in part) a commemoration, or was that commemoration just a *condition* on the gift? Cardozo invoked promissory estoppel to show that the answer to this question could not be deduced from some formal or abstract notion of offer and acceptance, but instead had to be informed by a reconstruction of what, in context, the parties probably had in mind. When deciding whether a specification by a donor is seeking a return promise or setting a condition on a gift, one must consider the type of transaction at issue: charitable subscriptions. Interpreting the meaning of ambiguous actions

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<sup>5</sup> ANDREW L. KAUFMAN, CARDOZO 335 (1998).

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and statements depends, in other words, on recognizing, as case law concerning promissory estoppel had already done, that charitable donations are quite different from commercial exchanges. This context-dependent treatment of the offer and acceptance formalities is, I will argue, of a piece with Cardozo's other writings on that subject, such as *Wood v. Lucy, Lady Duff-Gordon*<sup>6</sup> and *De Cicco v. Schweizer*.<sup>7</sup> Cardozo was not interested in modifying the doctrine of consideration, rather he was applying it in a way that respected both how the parties likely understood the transaction themselves and how parties typically understand these kinds of transactions.

Properly understood, then, *Allegheny College* is a subtle and insightful, but narrow decision about bargaining in the context of charitable subscriptions and consequently should not be included in the promissory estoppel section of casebooks. Indeed, much of the confusion about the case probably stems from it being thus improperly presented. Understood in its proper context, the case is much less controversial. It emphasizes that the move from the benefit/detriment test for consideration to the bargained-for theory of consideration requires that a promise be given in order to induce a certain action. Action in reliance on a promise (in this case, an implied action and an implied promise) is not sufficient for consideration, *even if it is something that the promisor demonstrably desires*, unless the promisor makes the promise in order to induce that action. But if a party does give a promise, at least in part, in order to induce a return promise or action, then the promise (and the return promise) is enforceable, even though the primary motivation for the promise may be altruistic. Contra the Second Restatement, purely donative promises are not enforceable without reliance, even when made to charities.

I shall also argue that although this decision itself ought to have had only a modest impact on the law and certainly ought not to have generated so much fuss in debates about consideration and promissory estoppel, we still stand to learn much by studying it. The case is not only defensible, but it is also a good example of what we might call contextual formalism, a term that may sound self-contradictory at first, but which I will argue is not. The opinion demonstrates a proper respect for the formalities of contract law — in particular, the framework of offer and acceptance and the central idea of inducement — yet recognizes that

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<sup>6</sup> *Wood v. Lucy*, 118 N.E. 214 (N.Y. 1917).

<sup>7</sup> *De Cicco v. Schweizer*, 117 N.E. 807 (N.Y. 1917).

these technical requirements should be understood in the proper context in which particular contracts are formed. The case is not an attempt to excuse charities from formalities just because we favor them as a matter of public policy, but rather insists that we not ignore the context in which charitable subscriptions take place. Cardozo is known for his attention to context in commercial transactions and was influential in the U.C.C.'s move to be more flexible toward the way business is actually conducted. In *Allegheny College*, he is attentive to how charitable subscriptions are solicited and promised. The opinion is not an attack on the doctrine of consideration, but an appeal to a formalism that considers the context of transactions and tries to see them from the point of view of the parties involved — the kind of formalism to which, partly thanks to Cardozo, we are already more accustomed in commercial law.

The argument will proceed as follows: Section I will lay out the facts and a brief summary of the reasoning of *Allegheny College*. Section II will focus on the standard readings of the case and why those readings are flawed. In Section III, I will explain in more detail my reading of the case and argue that it is not really a difficult consideration or promissory estoppel case at all. Finally, in Section IV, I will argue that Cardozo used similar reasoning in two of his other, more famous contracts opinions. Section V concludes with a brief comment on Cardozo's place in the history of American legal theory and suggests that he has a larger lesson for us in the debates about contract formalities.

#### I. MARY YATES JOHNSTON'S GIFT

The facts of *Allegheny College* are fairly simple. In 1921, Allegheny College was conducting a pledge drive with a goal of adding an additional endowment of \$1,250,000.<sup>8</sup> The college solicited Mary Yates Johnston of New York to make a pledge.<sup>9</sup> In response, she signed and delivered the following pledge, apparently on a preprinted form sent out by the college:

Estate Pledge, Allegheny College Second Century Endowment.

Jamestown, N.Y., June 15, 1921.

In consideration of my interest in Christian Education, and in

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<sup>8</sup> *Allegheny Coll. v. Nat'l Chautauqua County Bank*, 159 N.E. 173, 173-74 (N.Y. 1927).

<sup>9</sup> *Id.* at 174.

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consideration of others subscribing, I hereby subscribe and will pay to the order of the Treasurer of Allegheny College, Meadville, Pennsylvania, the sum of Five Thousand Dollars; \$5,000.

This obligation shall become due thirty days after my death, and I hereby instruct my Executor, or Administrator, to pay the same out of my estate. This pledge shall bear interest at the rate of . . . per cent; per annum, payable annually, from . . . till paid. The proceeds of this obligation shall be added to the Endowment of said Institution, or expended in accordance with instructions on reverse side of this pledge.

Name: Mary Yates Johnston

Address: 306 East 6th Street, Jamestown, N.Y.

Dayton E. McClain, Witness,

T. R. Courtis, Witness,

to authentic signature.<sup>10</sup>

The reverse side contained the following instructions:

In loving memory this gift shall be known as the Mary Yates Johnston Memorial Fund, the proceeds from which shall be used to educate students preparing for the Ministry, either in the United States or in the Foreign Field.

This pledge shall be valid only on the condition that the provisions of my Will, now extant, shall be first met.

Mary Yates Johnston.<sup>11</sup>

Although the money was not due until thirty days after her death, \$1000 was paid in December 1923 and set aside by the college as a scholarship fund for students preparing for the ministry.<sup>12</sup> But in 1924, Johnston repudiated her promise to pay the balance.<sup>13</sup> After her death,

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* Although not reported in the case, subsequent research suggests that she cancelled the pledge because she wanted to be sure she could leave enough money to her

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Allegheny College brought suit against her estate for the remaining \$4000.<sup>14</sup>

The primary issues in the case are immediately apparent to any first-year contracts student. Although contract law generally concerns the enforcement of promises, it is well-established that not all promises are enforceable by law. In particular, purely donative promises, i.e., promises to make a gift, are generally not enforceable. Instead, contract law seeks to enforce promises supported by consideration, i.e., promises that are part of a bargained-for exchange. However, in some cases, promises will be enforced even outside of a bargaining context if the recipient of the promise reasonably relies on that promise to its detriment. This doctrine of “promissory estoppel” was fairly new in 1927, yet well established in New York at least for promises made to charities. The issue then, in a case such as this one, is whether Johnston’s promise was supported by consideration — whether it was part of a bargained-for exchange — or, in the alternative, whether it was enforceable for having caused Allegheny College reasonably to rely on it to its detriment.

Despite the prima facie obviousness of the issues, virtually the only thing accepted without controversy about Cardozo’s opinion is that the court ruled for Allegheny College.<sup>15</sup> In the end, most readers — both first-year students and commentators alike — are left puzzled about what exactly the basis for Cardozo’s ruling is, especially when one applies the facts of the case to possible interpretations of the doctrine. As one Cardozo biographer, Andrew Kaufman, summarizes, the “exasperating” opinion “has been severely criticized by the commentators either on the basis that a reader cannot tell whether it is based on consideration or promissory estoppel, or on the basis that the facts do not support his result, or both.”<sup>16</sup>

Most of the controversy surrounding *Allegheny College* swirls around the first five paragraphs following his summary of the facts. Cardozo first notes that promises are, in general, not binding without consideration, but that courts have often relaxed the consideration

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daughter for her daughter to help impoverished relatives. See Alfred S. Konefsky, *How to Read, or at Least Not Misread, Cardozo in the Allegheny College Case*, 36 BUFF. L. REV. 645, 656-59 (1987).

<sup>14</sup> *Allegheny Coll.*, 159 N.E. at 174.

<sup>15</sup> *Id.* at 177.

<sup>16</sup> KAUFMAN, *supra* note 5, at 335.

requirement for charitable subscriptions.<sup>17</sup> He then cites *Hamer v. Sidway* for the benefit/detriment test for consideration, according to which consideration will be found when a promise results in either a benefit to the promisor or a detriment to the promisee.<sup>18</sup> But in characteristically colorful language, he notes that the test as articulated in *Hamer* is not the whole story: "So compendious a formula is little more than a half truth. There is need of many a supplementary gloss before the outline can be so filled in as to depict the classic doctrine."<sup>19</sup> To fill in this outline, he cites contract law's classical triumvirate of Holmes, Williston, and Langdell for the proposition that consideration requires not only that the promise cause a detriment to the promisee, but that the promise must be offered as an inducement to the promisee.<sup>20</sup> However, because "[t]he half truths of one generation tend at times to perpetuate themselves in the law as the whole truth of another," this classic doctrine has been effaced, as courts have gone far towards "obliterating this distinction."<sup>21</sup> He officially remains agnostic as to whether the classic doctrine — again, that the promisee's detriment must be bargained for (and not just the result of) the promisor's promise — has been modified as a general matter.<sup>22</sup> But it is certain, he asserts, that New York has "adopted the doctrine of promissory estoppel as the equivalent of consideration" at least for charitable subscriptions.<sup>23</sup> Then he appears to set up the issue of the case:

So long as those decisions stand, the question is not merely whether the enforcement of a charitable subscription can be squared with the doctrine of consideration in all its ancient rigor. The question may also be whether it can be squared with the doctrine of consideration as qualified by the doctrine of promissory estoppel.<sup>24</sup>

He then cites a few New York cases enforcing charitable subscriptions based on the doctrine of promissory estoppel and makes a vague

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<sup>17</sup> *Allegheny Coll.*, 159 N.E. at 174-75.

<sup>18</sup> *Id.* at 174.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> "Whether the exception has made its way in this State to such an extent as to permit us to say that the general law of consideration has been modified accordingly, we do not now attempt to say." *Id.* at 175.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*



reference to the “public policy” behind those decisions.<sup>25</sup>

To this point, Cardozo’s discussion is not very puzzling. He has argued that the classic consideration doctrine is not the benefit/detriment test as laid out in *Hamer*, but rather the bargained-for theory of consideration endorsed by Holmes, Langdell and Williston. However, he argues that the doctrine of promissory estoppel has qualified this stiffer test somewhat, at least in charitable subscription cases, such that reasonable reliance may be sufficient in some cases even if that reliance is not bargained for by the promisor. If one were to skip the facts and read only this much of the reasoning, one would expect the case to be about a promisee relying on a donative promise when the promisor may or may not have intended to induce that reliance with her promise. At this point, however, Cardozo includes a curious statement:

It is in this background of precedent that we are to view the problem now before us. The background helps to an understanding of the implications inherent in subscription and acceptance. *This is so though we may find in the end that without recourse to the innovation of promissory estoppel the transaction can be fitted within the mould of consideration as established by tradition.*<sup>26</sup>

So despite all of the discussion about how the “classic” doctrine of consideration may have been “subjected to a[n] expansion” by the doctrine of promissory estoppel, it turns out we “may” be able to decide the facts of this case without recourse to such a relaxed standard.

Indeed, when we recall the facts of the case, it is unclear how the doctrine of promissory estoppel has anything to do with it. Although promissory estoppel does not require a bargained-for exchange, it does require actual (detrimental) reliance on the part of the promisee. In this case, Allegheny College did not reasonably rely on Johnston’s pledge at all, at least not to its detriment — a point Cardozo fails to make explicit. Although Johnston asked that the college memorialize her gift as the “Mary Yates Johnston Memorial Fund,” it never established any such fund, and there is no evidence that it did anything more in reliance on her promise than set aside the \$1000 she did contribute in a scholarship fund.<sup>27</sup> By contrast, the cases Cardozo cites for the promissory estoppel “exception” involved actual reliance by promisees based on the

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> Johnston’s estate was not asking for the return of this \$1000; the only issue was whether the estate had to pay the remaining \$4000. Konefsky, *supra* note 13, at 656-57.

promisors' promises, such as the building of a church based on the promise to provide money for that specific purpose.<sup>28</sup> And, in fact, Cardozo goes on to discuss the facts in terms of Johnston's desire to memorialize her name by means of a gift to the college. He finds consideration by arguing that when the college accepted her \$1000 advance, it assumed an obligation to establish the fund she asked for in her initial pledge.<sup>29</sup> For Cardozo, the college was not free to spend her contribution in any way it saw fit, but rather by accepting part of the money, it committed itself to spend the gift only as she asked. That obligation supported Johnston's own correlative obligation to pay the rest of the money. Since courts do not inquire into the adequacy of consideration, it did not matter what the memorial fund was worth to her, but Cardozo argued that the "longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good."<sup>30</sup> The college's implicit obligation was sufficient consideration to bind Johnston to her initial promise of the full \$5000, since the "plan conceived by the subscriber will be mutilated and distorted unless the sum to be accepted is adequate to the end in view."<sup>31</sup>

I shall argue that the opinion is best understood as a rather mundane application of the consideration doctrine with a more controversial, yet ultimately defensible, view outlining when the law may treat a return promise as an acceptance of an offer. First, though, I shall survey the well-known readings of the opinion and show why they are misguided.

## II. MARC ANTONY, THAUMATROPES, AND OTHER MISREADINGS

Cardozo's discussion of promissory estoppel has led some to conclude that the decision is based on that doctrine rather than on the doctrine of consideration. Even Arthur Corbin, one of the most distinguished contract scholars in the history of American jurisprudence, so concluded:

"It was held that [the promise] became binding, in accordance with the promissory estoppel doctrine, when the College received the part payment. . . . Thus the revocable promise of the subscriber was turned into an enforceable bilateral contract by applying the

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<sup>28</sup> See *Keuka Coll. v. Ray*, 60 N.E. 325, 326-27 (N.Y. 1901); *Roberts v. Cobb*, 9 N.E. 500, 501 (N.Y. 1886); *Presbyterian Soc'y of Knoxboro v. Beach*, 74 N.Y. 72, 76 (1878); *Barnes v. Perine*, 12 N.Y. 18, 26-27 (1854).

<sup>29</sup> *Allegheny Coll.*, 159 N.E. at 175-77.

<sup>30</sup> *Id.* at 176.

<sup>31</sup> *Id.*

supposed doctrine of promissory estoppel.”<sup>32</sup>

Unfortunately, Corbin does not go on to explain his claim that Cardozo decided the case on promissory estoppel grounds. So stated, Cardozo’s position seems so untenable that one commentator likened it to a “deep, dark family secret” that no one, including followers of Corbin, like Grant Gilmore, ever dared cite.<sup>33</sup> Since Cardozo never claimed that Allegheny College relied on the promise and since he suggested (if less forcefully than one might like) that the case could be decided by traditional consideration doctrine, one wonders how Corbin came to his conclusion. If that was the grounds for the decision, then the decision deserves all the criticism it has received.

Lest we be too hard on Corbin, it is worth noting that others have made qualified versions of the same claim. As I pointed out above, the case appears in the promissory estoppel section of most major casebooks. The brief comments about the case in the casebooks vary. For example, although one leading textbook places the case in the promissory estoppel section, it points out in its commentary that the case is based on “traditional notions of consideration.”<sup>34</sup> Another describes it as a model case “for understanding the interaction between the doctrines of consideration and promissory estoppel.”<sup>35</sup> But one textbook places the case in the “reasonable reliance” section without further comment, despite the fact that the case contained no reliance (reasonable or otherwise) nor was any alleged.<sup>36</sup> Another grants that Judge Cardozo “claims that the promise is supported by consideration,” but then notes with virtually no further comment that the case “has been commonly categorized as an early example of promissory estoppel.”<sup>37</sup> And one textbook introduces the case and the section on promissory estoppel with the following comment:

“It is a traditional rule that the promisee’s action or forbearance must have been sought by the promisor. That is, the promisor must have bargained for the action or forbearance. *The doctrine of promissory estoppel violates this rule in the circumstances explored*

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<sup>32</sup> Arthur L. Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 52 HARV. L. REV. 408, 417 (1938-39).

<sup>33</sup> Konefsky, *supra* note 13, at 650.

<sup>34</sup> SCOTT & KRAUS, *supra* note 3, at 194.

<sup>35</sup> MURRAY, *supra* note 3, at 38.

<sup>36</sup> DAWSON ET AL., *supra* note 3, at 247.

<sup>37</sup> BARNETT, *supra* note 3, at 709.

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below.”<sup>38</sup>

As I will argue, that is exactly what is *not* at issue in either the facts of *Allegheny College* or in Cardozo’s reasoning about charitable subscriptions.

The scholarship in law reviews on the case is in many ways misguided as well.<sup>39</sup> Some scholars have accused Cardozo of ruling based on promissory estoppel, at least in part, by playing rhetorical games. For example, Mike Townsend argues that the opinion “support[s] the Restatement’s basic position that reliance can provide a nonbargain basis for promissory liability.”<sup>40</sup> Townsend contends that Cardozo provides this support by “juxtaposing bargain and reliance theories to produce an effect reminiscent of that resulting from Mark Antony’s funeral oration for Julius Caesar.”<sup>41</sup> According to Townsend, Cardozo’s strategy was to win rhetorical support by saying the exact opposite of what he meant. Just as Marc Antony repeatedly told the Romans that Caesar was ambitious and Brutus honorable in order to convince them of the opposite, Townsend argues that Cardozo “adopts a certain ironic and ultimately corrosive deference towards a position that he wishes to attack,” namely the bargained-for theory of consideration.<sup>42</sup> More surprising is the fact that Townsend praises this alleged strategy as an example of “law as art.”<sup>43</sup> To be sure, Townsend may be right that Cardozo may have been trying to weigh in on the promissory estoppel and consideration debates surrounding the drafting of the first Restatement.<sup>44</sup> But even if Cardozo wanted to favor reliance over bargained-for consideration, Townsend offers no explanation for where Cardozo could find such reliance on these facts or for how the promissory estoppel discussion served as the grounds for the decision rather than mere dicta. Instead, he suggests we go “beyond elementary translations into the legal media of intuitive bases of promissory

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<sup>38</sup> CRANDALL & WHALEY, *supra* note 3, at 211 (emphasis added). It is worth noting that the quoted language does not appear in the just-released fourth edition of the casebook.

<sup>39</sup> One textbook avoids making its own misstatements about the case, but refers to the scholarship on the case in some detail, including citing with approval some of the most unfortunate misreadings of the opinion. See KNAPP ET AL., *supra* note 3, at 91-92.

<sup>40</sup> Mike Townsend, *Cardozo’s Allegheny College Opinion: A Case Study in Law as an Art*, 33 HOUS. L. REV. 1103, 1140 (1996).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1104-07.

<sup>44</sup> *Id.* at 1117-34.

liability."<sup>45</sup> Intriguing as the *Julius Caesar* interpretation may be, without better evidence for it, it seems more plausible to operate on the assumption that Cardozo meant what he said rather than its opposite, notwithstanding Townsend's intriguing suggestion about the "legal media of intuitive bases."<sup>46</sup>

In another oft-cited article, Leon Lipson argued that promissory estoppel was at least a partial ground for Cardozo's holding, but also accused Cardozo of sleight of hand:

When we look at the oscillation of argument in the opinion, we are reminded rather of another image, one that was suggested a hundred years before the Allegheny College Case by that odd and engaging logician, Richard Whately. . . . Judge Cardozo goes from consideration to promissory estoppel to consideration to duty-&-obligation to promise to consideration to promissory estoppel to victory for Allegheny College. Whenever his argument emphasizing consideration runs thin, he moves on to promissory estoppel; whenever his hints in favor of promissory estoppel approach the edge of becoming a committed ground of decision, he veers off in the direction of consideration. Arguments that oscillate in this way, repeatedly promoting each other by the alternation, call to mind Whately's simile of "the optical illusion effected by that ingenious and philosophical toy called the Thaumatrope: in which two objects are painted on opposite sides of a card — for instance, a man and a horse, [or] — a bird and a cage"; the card is fitted into a frame with a handle, and the two objects are, "by a sort of rapid whirl, [of the handle], presented to the mind as combined in one picture — the man *on* the horse's back, the bird *in* the cage."

Now what were the objects painted on the opposite sides of Judge Cardozo's Thaumatrope? His trouble was that on the consideration side he had a solid rule but shaky facts; on the promissory-estoppel side he had a shaky rule but (potentially) solid facts. He twirled the Thaumatrope in order to give the impression that he had solid facts fitting a solid rule. Some lawyers think that what emerges instead is a picture of a bird on a horse's back.<sup>47</sup>

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<sup>45</sup> *Id.* at 1140.

<sup>46</sup> Another imaginative literary interpretation accuses Cardozo of being an indecisive Hamlet. See Prakash Mehta, Note, *An Essay on Hamlet: Emblems of Truth in Law and Literature*, 83 GEO. L.J. 165, 181-82 (1994).

<sup>47</sup> Leon Lipson, *The Allegheny College Case*, 23 YALE L. REP. No. 3, 11 (1977).

This characterization of Cardozo as sophist, while perhaps entertaining and provocative, is unwarranted. The opinion may be somewhat difficult, but it is not as unclear as Lipson suggests. More importantly, once again the interpretation is belied by the simple facts of the case. Lipson states that Cardozo has a solid rule “on the consideration side” but shaky facts — a claim that is true enough. But the other half of the Thaumatrope metaphor, i.e., that in the promissory estoppel side he had a “shaky rule but (potentially) solid facts” — is not true. The rule of promissory estoppel was fairly solid at that time in New York, at least as it applied to charitable subscription cases where there was actual reliance, as in the cases Cardozo cites.<sup>48</sup> And as we have seen, Cardozo did not have solid facts at all. He “potentially” had solid facts, since we can easily imagine how a college might rely on such a promise, and Cardozo himself gives us examples. But potential facts are, of course, of no value in an actual dispute. Nor does Cardozo ever claim to base his decision on the fact that Allegheny College might have potentially relied, much less actually relied, on the promise. Promissory estoppel requires actual reliance, and Cardozo never claims there was any such thing in this case. The briefs by both parties do not focus on reliance but on traditional consideration doctrine.<sup>49</sup> Promissory estoppel is barely mentioned at all.<sup>50</sup>

Richard Posner recognizes in his brief discussion of the case that Cardozo decides the case based on consideration, though he considers this reasoning to be “too clever by half.”<sup>51</sup> He goes on to say that Cardozo was “plainly onto something,” since we now normally do not require consideration for charitable subscriptions.<sup>52</sup> One wonders how we could conclude that Cardozo was onto something by finding consideration in a case in which it was not there, based on the claim that we do not now require it. In any event, immediately after noting that the case was decided on consideration grounds, Posner asserts (citing Corbin) that *Allegheny College* was a “seminal contribution to the emerging doctrine of promissory estoppel.”<sup>53</sup>

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<sup>48</sup> Even Judge Kellogg’s dissent notes that promissory estoppel is nothing new. *Allegheny Coll. v. Nat’l Chautauqua County Bank*, 159 N.E. 173, 177-78 (N.Y. 1927) (Kellogg, J., dissenting).

<sup>49</sup> Konefsky, *supra* note 13, at 684.

<sup>50</sup> *Id.*

<sup>51</sup> POSNER, *supra* note 4, at 14-15. Posner also derides the opinion by quoting negative language from Konefsky’s article, discussed *infra* note 53.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

Alfred Konefsky offers a much better, and certainly more comprehensive, understanding of the case. Konefsky recognizes that the case is not decided on promissory estoppel grounds<sup>54</sup> and that, therefore, Corbin and Lipson — the two authors whose interpretations he talks about in detail — have misread the case.<sup>55</sup> But Konefsky himself seems unfairly to criticize Cardozo in an important and fundamental way. Konefsky interprets the discussion of the history of consideration doctrine and promissory estoppel as Cardozo's attempt to use the doctrine of promissory estoppel not to decide this case directly, but rather "for the general program of expanding the consideration doctrine."<sup>56</sup> Although at one point Konefsky recognizes that Cardozo thinks he "can get by with standard consideration doctrine,"<sup>57</sup> most of his argument is devoted to accusing Cardozo of arguing that "at least in his hands, consideration doctrine is a more open and flexible concept than is usually appreciated."<sup>58</sup>

The conclusion is that whatever consideration is, it is, at the least, an expansive, flexible, and adaptable doctrine. Then, as evidence of that insight, the concept of promissory estoppel is introduced, not as an exception to consideration doctrine, but as a continuation of the process of enlarging it. In other words, promissory estoppel is used informatively, as an historical lesson, and instrumentally, as a means to expand consideration.<sup>59</sup>

For Konefsky, the case is decided on the basis of consideration, but the references to promissory estoppel are a means by which Cardozo can stretch consideration beyond its classical bounds. At one point, Konefsky goes so far as to endorse<sup>60</sup> Grant Gilmore's allegation that Cardozo could find consideration "anywhere," effectively rendering the doctrine "meaningless."<sup>61</sup>

In the next section I shall agree with Konefsky that Cardozo was indeed giving us a history lesson, though I shall disagree about what the point of that lesson is. For now, it is crucial to see what has generally gone unnoticed: Cardozo was not using promissory estoppel

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<sup>54</sup> Konefsky, *supra* note 13, at 684.

<sup>55</sup> *Id.* at 653.

<sup>56</sup> *Id.* at 654.

<sup>57</sup> *Id.* at 670.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 687.

<sup>60</sup> *Id.* at 671.

<sup>61</sup> GRANT GILMORE, *THE DEATH OF CONTRACT* 69 (Ronald K. L. Collins ed., 1995).

“instrumentally” to “expand consideration doctrine” himself in this case, for the simple reason that the case requires no such expansion. Cardozo decided for the college on the ground that, by accepting the \$1000 prepayment, the college assumed a duty to honor Johnston’s wishes as stated in the initial pledge. If we grant him this assumption — a big *if* I admit, but I shall argue that point soon enough — then the case simply involves a promise for a promise, even though one of the promises is implied. To be sure, it is always tricky business finding implied promises, but the point for now is that from the standpoint of consideration doctrine, there is nothing unusual here. It is simply a case of a bilateral contract, and according to a leading treatise, bilateral contracts “are more common than unilateral contracts and make up the bulk of economically significant transactions today.”<sup>62</sup> Moreover, the “return promise is usually express but may be implied.”<sup>63</sup>

Oddly, although Konefsky is meticulous in parsing the opinion, he glosses over language that, if sound, makes this an easy case in terms of the general principles of consideration. After spending a good deal of time tentatively flirting with the possibility that Cardozo is inferring a mutual obligation grounded in an implied promise by the college,<sup>64</sup> Konefsky has little to say about the following passage from Cardozo’s opinion:

When the promisee subjected itself to such a duty at the implied request of the promisor, the result was the creation of a bilateral agreement. . . . There was a promise on the one side and on the other a return promise, made, it is true, by implication, but expressing an obligation that had been exacted as a condition of the payment. A bilateral agreement may exist though one of the mutual promises be a promise “implied in fact,” an inference from conduct as opposed to an inference from words. . . . We think the fair inference to be drawn from the acceptance of a payment on account of the subscription is a promise by the college to do what may be necessary on its part to make the scholarship effective.<sup>65</sup>

This passage explains why these facts can be fitted “within the mould of

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<sup>62</sup> E. ALLEN FARNSWORTH, *CONTRACTS* § 2.3 (4th ed. 2004).

<sup>63</sup> *Id.*

<sup>64</sup> Konefsky, *supra* note 13, at 673-75.

<sup>65</sup> *Allegheny Coll. v. Nat’l Chautauqua County Bank*, 159 N.E. 173, 176 (N.Y. 1927) (citations omitted).



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consideration as established by tradition.”<sup>66</sup> We are justified in inferring a request for a promise by the offeror and a return promise by the offeree. Promises — even implied promises — are adequate consideration for each other.

For some reason, this part of the opinion has been greatly underappreciated. Konefsky, for example, does recognize that “Cardozo’s bilateral contract is found in the exchange of promises, even if implied, between the parties.”<sup>67</sup> But one wonders, then, why he sees the opinion as Cardozo’s attempt to “expand consideration.” And in fact, despite the clarity of the above passage by Cardozo, just before Konefsky’s accurate one-sentence summary, he gives a somewhat tortured and uncharitable reconstruction of Cardozo’s argument:

If the college has an implied duty, and if it can violate it, then there must be a detriment to the promisee. The reason there must be a detriment is because there must be consideration, because if there is consideration, you can sue the other party. If you can sue the other party, then there must be a contract. That is why we are being led down the path.<sup>68</sup>

This reconstruction smacks of circularity. Fortunately, no such gymnastics are needed. Cardozo’s argument is simply that the facts justify us implying a promise for a promise.

What’s more, Cardozo’s reasoning here makes perfectly good sense, and he was correct to imply a promise on behalf of the college. As Cardozo put it, if the college did not wish to endow a scholarship in Mary Yates Johnston’s name, as she asked, “the time to speak” up<sup>69</sup> was when she gave the college the initial \$1000, and it accepted it. Of course, if the college really did not want to fulfill her wishes, then we might have supposed that it should have spoken up when it received her pledge card. Yet assuming an implied promise from the college’s failure to object upon receipt of her pledge would be a stretch. Receiving a promise to make a donation and accepting money are two different things, since one might passively receive a pledge card without taking the same notice one would take of a check.<sup>70</sup> At a minimum, Cardozo is

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<sup>66</sup> *Id.* at 175.

<sup>67</sup> Konefsky, *supra* note 13, at 680.

<sup>68</sup> *Id.* at 679-80.

<sup>69</sup> *Allegheny Coll.*, 159 N.E. at 177.

<sup>70</sup> The distinction does, however, depend on contingent circumstances. In some cases we may be justified in inferring an implied promise without the advance payment, depending on the particular facts. The determination would depend, among other things,

right that the sense of the college being obligated gains strength upon its acceptance of her money, knowing her conditions for giving it. It is fairly intuitive to suppose that the college had a duty to use her money as she wished once they took it in the knowledge of her wishes for its use.

But if the case is such an easy case on consideration grounds and is not based on promissory estoppel, why does Cardozo devote six paragraphs of an eleven-paragraph opinion to the question of whether or not the consideration doctrine has been modified by promissory estoppel? One suggestion, offered by Christopher Eisgruber, has it that Cardozo was attempting to synthesize the competing legal precedents, doctrines, and theories into a complete account of consideration doctrine as it then stood.<sup>71</sup> Under this reading, the opinion serves almost as a treatise on consideration doctrine as it had been influenced by promissory estoppel at that time. Eisgruber sees Cardozo as judging the way Ronald Dworkin's mythical Hercules<sup>72</sup> would, weaving a coherent narrative out of the history of contract doctrine, attempting not only to decide the case, but also to put forth literally the "whole truth" about consideration doctrine.<sup>73</sup> Not surprisingly, Eisgruber ultimately argues that Cardozo falls short of this colossal task, but, nevertheless, considers it a good try and a wonderful teaching tool.<sup>74</sup>

While Eisgruber's understanding of why Cardozo ruled for Allegheny College is in many ways consistent with my own, I find his explanation for why Cardozo devoted so much discussion to promissory estoppel

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on how many pledges the college received; how significant the amount of money at issue was; how, if at all, the college acknowledged the initial pledge; and so on. In *Allegheny* there was an advance payment, and, therefore, we do not have enough information on which to judge with any confidence whether the inference of an implied return promise would have been justified without that payment. I thank Lois Shepherd for emphasizing this point to me.

<sup>71</sup> Christopher L. Eisgruber, *Great Contracts Cases: Teaching Law Through Contracts and Cardozo*, 44 ST. LOUIS U. L.J. 1511, 1528 (2000).

<sup>72</sup> Ronald Dworkin argued that the correct legal answer in any given case is the answer that "provide[s] the best constructive interpretation of the community's legal practice." RONALD DWORKIN, *LAW'S EMPIRE* 225 (1986). In mature societies with complex legal institutions and long histories, this act of interpretation will in many cases be too complex for human judges to perform with complete accuracy, especially in hard cases. Thus we should imagine a judge of "superhuman intellectual power and patience," whom Dworkin dubbed "Hercules." *Id.* at 239. The "true" propositions of law, according to Dworkin, are the conclusions at which Hercules would arrive using Dworkin's constructive/interpretive approach. *Id.*

<sup>73</sup> Eisgruber, *supra* note 71, at 1529.

<sup>74</sup> *Id.* at 1530-33.

unsatisfying. For one thing, Cardozo was not a system-builder. Even if he were, the idea of using a single case for such a project is dubious at best. Moreover, the explanation goes well beyond even Dworkin's interpretive model of jurisprudence. Although Dworkin's interpretive jurisprudence does require judges to decide cases with a view toward the case's place in the larger narrative structure of precedent, nothing in that position requires or even supports the idea that a judge should use a single case to lay out a theory that goes well beyond the facts of that case to cover an entire area of doctrine. And in any event, *Allegheny College*, with its narrow facts and even narrower issue, would be a poor candidate for such a project.

The next section offers my interpretation of the opinion. I argue that there is an important sense in which, for Cardozo, the doctrine of consideration has been modified by the doctrine of promissory estoppel, and that is the degree to which promises made in the context of charitable subscriptions will be understood as bargaining, as offers inviting acceptance. Cardozo was not arguing that after promissory estoppel reasonable reliance is sufficient for consideration (as Corbin thought); he was not a "tricky guy"<sup>75</sup> playing a rhetorical shell game by mentioning promissory estoppel to slip an opinion by the consideration doctrine (as Townsend, Lipson, and Posner thought); he was not using promissory estoppel to expand consideration because he found himself "trapped by the facts of the case and the unsettled law, an image of a man in a cage" (as Konefsky argued);<sup>76</sup> and he did not discuss promissory estoppel for the sake of offering a broad, comprehensive account of consideration doctrine (as Eisgruber argued). Instead, he cited promissory estoppel doctrine to support a more general claim that the law had developed a more capacious conception of the bargained-for aspect of consideration in the area of charitable subscriptions. This is no sleight of hand. On the contrary, it is contracts jurisprudence at its best, applying formal rules in a manner sensitive to the many contexts in which bargaining can take place — or so I argue in the remainder of this article.

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<sup>75</sup> POSNER, *supra* note 4, at 15. The general thrust of Posner's book is that Cardozo's distinctive talent as a judge was his ability to change the law for social good by means of great rhetoric to fool people into thinking he was just following precedent.

<sup>76</sup> Konefsky, *supra* note 13, at 687.

## III. RE-EXAMINING ALLEGHENY COLLEGE

Despite the confusion and frustration expressed by Cardozo's critics, his opinion in *Allegheny College* is quite clear. It is easy for us to make the opinion more difficult than it actually is because of the way we normally approach such cases. Normally, we look to see if a promise is enforceable by looking to see if it is supported by consideration. Promises not so supported may still be enforceable if the promisee reasonably relied to his detriment on the promise. Thus even when we fail to find consideration, we can sometimes look to promissory estoppel as grounds for enforcing a promise. When Cardozo discusses both of these grounds in *Allegheny College*, it is natural to think of him as also looking for one and then the other. Thus, when we read him speculating about whether or not consideration has been "expan[ded],"<sup>77</sup> "effac[ed],"<sup>78</sup> "modified,"<sup>79</sup> or "qualified"<sup>80</sup> or perhaps whether promissory estoppel is an "exception"<sup>81</sup> to the consideration doctrine, we naturally expect him to find some sort of reliance on the part of the college that would justify using promissory estoppel to enforce Johnston's promise. But he does not do this; instead he focuses on the college's assumption of an obligation, and thus it can seem that, for him, this very assumption is a form of reliance. But he is well aware that assuming an obligation does not constitute reliance. Thus, when he finds the requirements of consideration to be met after all, it is tempting to think he is relying on two different grounds for the decision, both of which sound almost right, but neither of which is, in fact, sufficient.

To understand Cardozo's decision requires that we shift the focus away from promissory estoppel's requirement that the promisee rely on a promise to his detriment and toward promissory estoppel's *lack* of a requirement that the promisor make her promise in order to induce such reliance. Although in most promissory estoppel cases the reliance by the promisee is an alternative grounds for recovery, another way to look at the cause of action is as a way of relaxing the bargained-for requirement from consideration doctrine. Promissory estoppel requires that there be a detriment to the promisee that is the result of the promisor's promise.<sup>82</sup>

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<sup>77</sup> *Allegheny Coll. v. Nat'l Chautauqua County Bank*, 159 N.E. 173, 175 (N.Y. 1927).

<sup>78</sup> *Id.* at 174.

<sup>79</sup> *Id.* at 175.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Except, again, in those jurisdictions that follow the Second Restatement's position on charitable subscriptions. RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (1981).

Under the benefit/detriment test for consideration as articulated in *Hamer v. Sidway*,<sup>83</sup> such a detriment alone would have been sufficient for consideration. But by Cardozo's day, consideration also required that the promisor give the promise *in order to induce* the detriment. As we shall see, his discussion of promissory estoppel makes clear that he is thinking of the doctrine not as a separate cause of action, but as a rethinking of the inducement requirement for consideration. When donors place conditions on their gifts, the transaction may rise to the level of an exchange enforceable by both sides, even if the donor's primary motivation is altruistic.

After laying out the facts in the two opening paragraphs, Cardozo begins his analysis in the third paragraph by noting that in the law of charitable subscriptions, "we have found consideration present where the general law of contract, at least as then declared, would have said that it was absent."<sup>84</sup> Whatever the requirements of consideration are, they have been relaxed for charitable subscriptions. He then in the fourth paragraph lays out the general understanding of what constitutes consideration.<sup>85</sup> He cites the famous case of *Hamer v. Sidway* and its benefit/detriment test.<sup>86</sup> But he cautions that the benefit/detriment test is "little more than a half truth."<sup>87</sup> The whole truth requires a "supplementary gloss," namely that the "promise and the consideration must purport to be the motive each for the other."<sup>88</sup> In other words, the promise must be given in order to induce the consideration and vice versa.

Having thus stated the rule, in the fifth paragraph he argues that the "half-truths of one generation tend at times to perpetuate themselves in the law as the whole truth of another."<sup>89</sup> Despite the fact that the modern conception of consideration requires not only that there be a detriment (or a benefit), but also that the promise must have been given in order to induce that detriment, the doctrine of promissory estoppel has "gone far in obliterating this distinction."<sup>90</sup> He declines to say whether or not promissory estoppel has thus modified the bargained-for test as a

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<sup>83</sup> 27 N.E. 256 (1891).

<sup>84</sup> *Allegheny Coll.*, 159 N.E. at 174.

<sup>85</sup> *Id.* at 174-75.

<sup>86</sup> *Id.* at 174.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* (quoting *Wis. & Mich. Ry. Co. v. Powers*, 191 U.S. 379, 386 (1903)).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* (quoting O. W. HOLMES, JR., *THE COMMON LAW* 292 (1881)).

general rule, but claims that it has at least done so with respect to charitable subscription cases.<sup>91</sup> Cardozo goes on in the sixth paragraph to cite several cases enforcing charitable subscriptions, even though the consideration requirement as traditionally understood had arguably not been met.<sup>92</sup> He suggests that those decisions may have been motivated by a public policy that loosens some of the formalities of contract law to favor charities, particularly when those formalities are arguably merely the result of "historical accidents of practice and procedure."<sup>93</sup> But while Cardozo recognizes that "the pressure of exceptions has led to irregularities of form," he explicitly denies that he is trying to do away with consideration.<sup>94</sup>

The reason the opinion strikes so many people as intellectually deceitful is because Cardozo cites other promissory estoppel cases that look factually dissimilar from the case he is deciding, since those cases all involve actual reliance. The point of his discussing promissory estoppel, though, is *not* to suggest that this is a case ripe for estoppel analysis, but merely to prepare us to relax our idea of what counts as an exchange. The most important feature of those cases, for Cardozo's purposes, is not that there was reasonable reliance, but that there was a promise enforced even though it was questionable whether or not each promise was given in order to *induce* the promisee's reliance.<sup>95</sup> Imagine for a moment that

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<sup>91</sup> *Id.* at 175.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Here is one place where Cardozo may be fairly accused of being a little cagey. He said that in *Barnes*, "the subscription was made without request, express or implied, that the church do anything on the faith of it." *Id.* But the court in *Barnes* argued that, had the plaintiff preserved the argument, the promise could have been enforced, and the case upheld on the more direct grounds that "the agreement and evidence establish a request on the part of the defendant to the trustees of the corporation . . . to erect a new church edifice . . . in consideration of which the defendant's promise to pay one hundred and fifty dollars was made." *Barnes v. Perine*, 12 N.Y. 18, 19, 24 (1854). Since the plaintiff did not preserve that argument, the court upheld the promise based on a series of cases finding basically that reliance itself could establish consideration in charitable subscription cases. *Id.* at 25-29. One could make similar arguments that the promises in *Keuka College v. Ray*, 60 N.E. 325 (N.Y. 1901); *Presbyterian Society of Knoxboro v. Beach*, 74 N.Y. 72 (1878); and *Roberts v. Cobb*, 9 N.E. 500 (N.Y. 1886), were all made in exchange for return action, though the courts do not address the issues so squarely. Indeed, *Beach* and *Roberts* are really more about who is entitled to enforce the promise rather than whether the promise is enforceable at all. And although *Keuka College* frames the issue mostly in terms of conditions on promises, the opinion states the central issue as "whether the agreement . . . expressly, or impliedly, either imposes upon the promisee some obligation, which is assumed, or requests of the promisee the performance of services, which are to be performed on the strength of the

when it received Johnston's \$1000, Allegheny College made an *express* promise to create the scholarship fund. As discussed above, finding an *implied* return promise from the college here may be problematic,<sup>96</sup> but not for consideration purposes. The problem, in other words, would not be a lack of anything on the promisee's side, but rather that the return promise was not the result of a bargained-for exchange, i.e., Johnston arguably did not make her own promise *in order to elicit* such a return promise, whether or not it was actually given. Cardozo's biggest challenge was not finding reliance or an obligation on the part of Allegheny College, but rather finding that Johnston gave her promise at least partly to induce the college to obligate itself by means of a promise to her.

After softening up his reader on the issue of inducement in charitable subscription cases, Cardozo writes the following key transitional paragraph, which I quote again in its entirety:

It is in this background of precedent that we are to view the problem now before us. The background helps to an understanding of the implications inherent in subscription and acceptance. This is so though we may find in the end that without recourse to the innovation of promissory estoppel the transaction can be fitted within the mould of consideration as established by tradition.<sup>97</sup>

"This background of precedent" has not been offered in order to confuse the reader, as many modern commentators have argued. Instead, the background helps us to understand that these transactions take place in a different context from commercial transactions and that courts have recognized this difference to be salient for legal analysis. The issue in this case is determining the "implications inherent in subscription and acceptance." Surprisingly, almost nothing is made in the literature about his phrase "subscription and acceptance." The words are chosen

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promise." *Keuka Coll.*, 60 N.E. at 326. This does not sound like an exception to the bargained-for consideration doctrine at all. But to the extent that Cardozo was being disingenuous in this sense, it is merely in how far the bounds of consideration had already been stretched beyond where he needed to go in this case. These prior cases are arguably not so far outside the scope of the traditional consideration doctrine as Cardozo suggested (if they were, of course, his own opinion would seem almost conservative by comparison). Instead, they are borderline cases of inducement, much like *Allegheny*, and provide more direct support for his arguments.

<sup>96</sup> Though even Judge Kellogg, in dissent, argues that the college would "clearly" assume such a duty. *Allegheny Coll.*, 159 N.E. at 177 (Kellogg, J., dissenting); see *infra*, note 103, and accompanying text.

<sup>97</sup> *Allegheny Coll.*, 159 N.E. at 175.

carefully and are meant to indicate that we are dealing with a special application of the basic rules of offer and acceptance, an application specific to charitable donations. The “background of precedent” is mentioned to show us that subscription and acceptance are not treated as rigorously as offer and acceptance in a commercial setting. In the last sentence, Cardozo tells us that the case may thus be decided on traditional consideration grounds after all, i.e., by offer and acceptance as traditionally understood, but only because, as he has already sought to establish, the law is not so strict when it comes to *subscription* and acceptance.

The opinion then turns to the case at hand, reasoning that, in accepting Johnston’s \$1000 advance payment, the college assumed a duty (by implication, promised) to memorialize her with that money. That in itself is not quite enough, however, because such requirements could have been built into Johnston’s pledge as a mere condition on her gift rather than as a demand for a promise.<sup>98</sup> One factor to consider in deciding whether “words of condition . . . indicate a request for consideration or state a mere condition in a gratuitous promise” is whether the occurrence of the condition would be a benefit to the promisor.<sup>99</sup> Cardozo readily concludes that the establishment of a memorial fund honoring the donor would be “beneficial to the promisor.”<sup>100</sup> Here he reminds us that we need not compare *how* beneficial it is in comparison to the value of the promise,<sup>101</sup> since courts need not inquire into the adequacy of consideration. He also notes that it might be more beneficial than one would at first think. “The longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good.”<sup>102</sup> Whereas Williston’s famous tramp<sup>103</sup> performed a condition that simply made the giving

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<sup>98</sup> If so, the college’s assumption of duty to memorialize would not be supported by consideration and could be renounced at will by the college.

<sup>99</sup> *Allegheny Coll.*, 159 N.E. at 176 (quoting SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 112 (1920)).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> In his treatise, Professor Williston gave the following, now famous, example to illustrate the difference between a condition on a gift and consideration:

“If a benevolent man says to a tramp: ‘If you go around the corner to the clothing shop there, you may purchase an overcoat on my credit,’ no reasonable person would understand that the short walk was requested as the consideration for the promise, but that in the event of the tramp going to the shop the promisor



easier on the promisor, Johnston was to receive something valuable in return for her promise. Thus, there is good reason to think she gave her promise at least in part in order to get that value.

According to this reading, Cardozo was not trying to undermine consideration doctrine at all. He was not even advocating for the broad treatment of charitable subscription cases eventually adopted in the Second Restatement, according to which gift promises to charities are enforceable even without reliance, though this opinion is sometimes cited as supporting that rule.<sup>104</sup> Rather, the holding is the very narrow one that, when a party promises money to a charity and includes conditions that can be said to benefit the promisor and the promisee accepts part of that money without objecting to those conditions, we are justified in finding adequate consideration to bind both parties. The condition on the gift is crucial to the decision. The donee implicitly promises to do as the donor wishes, and the donor is understood as having bargained for the donee's promise to carry out those wishes. We are perhaps stretching what counts as a donor offering a promise in exchange for a benefit, since it is likely that the donor's primary motivation is altruistic. But even if that is true, the law has in the past treated charitable subscription cases differently by permitting such stretching. The earlier cases show that, when we are dealing with charities, we are not so strict about what counts as bargaining, and we should not worry if the bargain made here does not look exactly like a bargain made in a normal commercial setting. When parties give to charities, they are not necessarily bargaining in an entirely self-interested way, but in some cases there will be enough self-interest for us to enforce their promises nonetheless. Just because an exchange is not a commercial exchange does not mean it is not to be taken seriously.

This reading of Cardozo's opinion is supported by Judge Kellogg's dissent. Kellogg has two main complaints about Cardozo's opinion. First, he argues that Cardozo tries to turn what was clearly a "gift" into a "trade."<sup>105</sup> Secondly, Kellogg complains that even if Johnston's promise

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would make him a gift. Yet the walk to the shop is in its nature capable of being consideration. It is a legal detriment to the tramp to make the walk, and the only reason why the walk is not consideration is because on a reasonable construction, it must be held that the walk was not requested as the price of the promise, but was merely a condition of a gratuitous promise."

WILLISTON, *supra*, note 98, § 112, at 232-40.

<sup>104</sup> Townsend, *supra* note 40, at 1140.

<sup>105</sup> *Allegheny Coll.*, 159 N.E. at 177 (Kellogg, J., dissenting).

to make a gift really were an offer, it was an offer that invited acceptance by performance, not by return promise.<sup>106</sup> Interestingly, Kellogg has no objection at all to inferring a return promise on the part of the college.<sup>107</sup> His objection was that Johnston never asked for a return promise. According to Kellogg, she was not making her promise in order to induce the college, but even if she were, she was trying to induce it to act, not to promise. According to this reading, the college did not accept her offer, and since an unaccepted offer is revoked at one's death, her estate was not bound.<sup>108</sup> Like many scholars since, Kellogg takes issue with Cardozo's version of the history of consideration and promissory estoppel, but he does so only in passing.<sup>109</sup> Kellogg sees that discussion as "beside the mark" since he does "not understand that the holding about to be made in this case is other than a holding that consideration was given to convert the offer into a promise."<sup>110</sup> Indeed, as we have seen, Cardozo invites us to conclude that his holding does not depend on the promissory estoppel discussion and is instead a straightforward application of consideration doctrine. The only thing Kellogg fails to do (openly) is take Cardozo's invitation to consider whether previous holdings in promissory estoppel and charitable subscriptions give us reason to find a "subscription and acceptance," even if we would not find an offer and acceptance.

If Cardozo ever referred to the *Allegheny College* case outside of his written opinion, we are apparently left with no record of it. But my reading of the case draws circumstantial support from two provisions in Cardozo's own will where it makes charitable gifts. The first endowed a bed at Mt. Sinai Hospital to be "maintained and dedicated in perpetuity to the sacred memory of [his] sister Ellen Ida Cardozo."<sup>111</sup> The second gift was to endow a chair of jurisprudence in Cardozo's own name at Columbia University Law School. However, this second gift, consisting of the residue of his estate, was given (in Professor Kaufman's words) with a "wish and hope, although not a mandatory direction," that the chair be created.<sup>112</sup> As Kaufman notes, Cardozo "clearly felt the desire to

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<sup>106</sup> *Id.*

<sup>107</sup> "Clearly, although a promise of the college to make the gift known, as requested, may be implied, that promise was not the acceptance of an offer which gave rise to a contract." *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 178.

<sup>111</sup> KAUFMAN, *supra* note 5, at 335.

<sup>112</sup> *Id.*

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perpetuate the family name was a serious matter.”<sup>113</sup> The Columbia bequest shows that he also knew how to convey preferences in a contractual setting in less grave terms. As the different wordings of his two gifts show, he was also well aware that sometimes gifts were just that, and that one could make suggestions with those gifts that one did not wish to be binding on the recipient. But without language making it clear that such instructions were suggestions rather than conditions, it is reasonable to suppose that the donor who imposes conditions really wants those conditions satisfied. The donor is in effect bargaining for a memorial and does not have the privilege of receiving a binding assurance without giving one himself or herself. Cardozo’s own careful wording of his gifts supports my argument that his opinion is an attempt to understand such transactions as the parties themselves understand them when they enter into them.

This argument draws further support from the wording of the Allegheny College pledge card, which is reminiscent of Cardozo’s two gifts. The preprinted card says that the gift would go into the endowment fund (the purpose of the pledge drive in the first place) unless the donor gave other “instructions” on the back of the card. It is not unreasonable, given this language, to see the college as in the first instance soliciting gifts, but in the alternative offering to bargain, in a sense, for contributions. Given the option, Johnston chose the latter option: to ask for something in return for her gift. It was certainly possible — indeed, the college words it as the default position — for her to give an outright gift without asking for anything in return. Instead, she wanted a memorial, something the college clearly would not promise without her own promise. The fact that the college was more than happy to make such an exchange does not mean it is not an exchange. And even though most donors are not as sophisticated about legal transactions as Cardozo, who in his own will consciously and carefully differentiated between an outright gift with non-binding suggestions and a gift in exchange for a memorial, in this case Allegheny College placed the option clearly before Johnston. Unsympathetic readers like Judge Kellogg want to paint a picture of a widow making a gift that a meddlesome court turns into a trade. But Cardozo’s opinion is a genuine attempt to understand the transaction from the parties’ own points of view.

In the next section, I will argue that my interpretation of Cardozo’s

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<sup>113</sup> *Id.*

opinion is of a piece with two of his other famous contracts opinions. What these opinions have in common, I shall argue, is not a respect for formalism in contract law, but an insistence that these formalities be applied in the proper context that the facts of individual cases present and accord with how those parties understood the transaction. That is hardly a new thesis in today's post-U.C.C. world, but it was not taken for granted in 1927. A lesson to draw from Cardozo is that we should also think similarly outside of commercial contexts. Although the holding of *Allegheny College* itself is narrow, by abstracting from this case and from other similar opinions by Cardozo, we learn a valuable general lesson about the proper role of formalism in contract law.

#### IV. CONTRACTS IN OTHER CONTEXTS

Before his career on the bench, Cardozo practiced law for over twenty years, mostly in the area of commercial transactions.<sup>114</sup> As a judge, he was able to bring his understanding of business transactions to bear on the cases he heard, so that he was better able to see the transactions from the point of view of the parties involved at the time of their agreement.<sup>115</sup> Often the result was that he found an enforceable agreement where a more narrow interpretation of contract doctrine might have found the contract to be unenforceable for failure to meet one formality or another. While it is easy to see this approach as an attack on formalist requirements, Cardozo was actually respecting the formalities of contract law even as he recognized that nominally similar transactions, in the real world, are often importantly distinct. There are many examples of contracts cases where Cardozo showed an acute sensitivity to commercial contexts — too many to cover in this project.<sup>116</sup> I will instead focus on one famous case as representative of his approach: *Wood v. Lucy, Lady Duff-Gordon*.<sup>117</sup>

In *Wood*, the designer Lady Duff Gordon<sup>118</sup> signed an agreement giving her manager, Otis Wood, an exclusive right to market her designs and

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<sup>114</sup> *Id.* at 315.

<sup>115</sup> *Id.* at 315, 337.

<sup>116</sup> See, e.g., *Can. Indus. Alcohol Co. v. Dunbar Molasses Co.*, 179 N.E. 383 (N.Y. 1932); *Heyman Cohen & Sons, Inc. v. M. Lurie Woolen Co.*, 133 N.E. 370 (N.Y. 1921); *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921).

<sup>117</sup> *Wood v. Lucy*, 118 N.E. 214 (N.Y. 1917).

<sup>118</sup> As Cardozo famously noted at the beginning of the opinion, “[t]he defendant styles herself ‘a creator of fashions.’ Her favor helps a sale.” *Id.* at 214.

give her endorsements to others.<sup>119</sup> In return for this exclusive right, Wood was to give half of the profits from such sales and endorsements to Gordon.<sup>120</sup> Wood eventually sued, claiming that Gordon had broken her promise by placing her endorsement on “fabrics, dresses and millinery” without his knowledge and without sharing the profits with him.<sup>121</sup> Gordon responded that the contract was unenforceable for lack of consideration because Wood never promised anything in return for Gordon’s promise of an exclusive right.<sup>122</sup>

In the opinion, Cardozo conceded that Wood had never made an express promise, but argued that the agreement contained an implied promise by Wood to “use reasonable efforts to place the defendant’s endorsements and market her designs.”<sup>123</sup> Such a promise could be “fairly to be implied” from the nature of the agreement.<sup>124</sup> The defendant gave an exclusive privilege for at least a year,<sup>125</sup> something she would presumably not do for free, and with the exclusive agency came the duties of an agent.<sup>126</sup> The contract contained numerous recitals, including that Wood’s business was “adapted to the placing of such endorsements. . . .”<sup>127</sup> Even more significant, according to Cardozo, were the terms under which Gordon was to be compensated: her only compensation was to be based on one-half of the money from the profits “resulting from the plaintiff’s efforts. Unless he gave his efforts, she could never get anything” from her endorsements.<sup>128</sup>

It is tempting to conclude that Cardozo’s finding of an implied promise in *Wood* is based on abstract notions of fairness. It might seem unjust for Gordon to have made a formal, written promise and then have renounced that promise later when a better deal came along. Cardozo opines that “[t]he law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* Although not noted in the opinion, she had signed a marketing agreement with Sears, Roebuck and Company. Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415, 439 (1988).

<sup>122</sup> *Wood*, 118 N.E. at 214.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> The contract was renewable each year, but terminable with 90-day notice after the first year. *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

fatal. It takes a broader view to-day."<sup>129</sup> It may sound as though Cardozo was allowing fairness to trump the formalities of contract law, but Cardozo's opinion is not a triumph of fairness over formalism. Rather, Cardozo insisted on seeing the contract as the parties themselves saw it at the time it was signed, even if it "imperfectly expressed"<sup>130</sup> their understanding. Inferring that Wood implied a promise not only makes the contract fair, it also makes the contract make sense. As Cardozo put it, "[w]ithout an implied promise, the transaction cannot have such business 'efficacy as both parties must have intended that at all events it should have.'"<sup>131</sup> We may "fairly" infer a promise by Wood not because that is the way by which we can achieve a fair result, but rather because, without such a promise, the transaction does not make business sense. In other words, assuming a promise was implied is a fair interpretation of the parties' intentions rather than just necessary to a fair outcome. The "broader view" that the law takes today — indeed, one must wonder if it were ever otherwise — is that we ought to apply these formal requirements of contract law in a way that makes sense with respect to the kind of transaction at issue. This was a business agreement — in particular an agency agreement — and we should interpret the contract and decide whether the formal requirements for enforceability have been met with that fact in mind. When looked at from a business perspective rather than from a too-narrow lawyerly perspective, it is clear that both parties intended to be bound in *Wood* even though they did not express their intentions clearly.

Despite his many years of business-law practice, Cardozo's keen eye for contractual context was not limited to commercial settings as has been claimed.<sup>132</sup> We saw in *Allegheny College* his insights into the giving of charitable gifts. Another good example is *De Cicco v. Schweizer*,<sup>133</sup> where Cardozo explored the issue of a father's promise to pay money to his daughter in the event of her marriage.<sup>134</sup> *De Cicco* involved an

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 214-15 (quoting L. J. Bowen, *The Moorcock*, 14 P.D. 64, 68 (1889)).

<sup>132</sup> See, e.g., KAUFMAN, *supra* note 5, at 337 ("Cardozo was at his best in the commercial context, where he had long experience as a lawyer . . . . The cases involving personal obligation outside the business context were more individual; there was less customary expectation to guide him. Cardozo struggled with some of these cases, with the result that these opinions were more labored and convoluted.")

<sup>133</sup> *De Cicco v. Schweizer*, 117 N.E. 807 (N.Y. 1917).

<sup>134</sup> Though he had many years of experience with business, Cardozo himself was a lifelong bachelor. KAUFMAN, *supra* note 5, at 328. Of course, this did not make him

agreement executed between Joseph Schweizer and Count Oberto Gulinelli.<sup>135</sup> In the agreement, dated January 16, 1902, “in consideration of” Gulinelli’s engagement to marry Schweizer’s daughter, Blanche Josephine Schweizer, on January 20 of that same year, Schweizer promised to pay his daughter an annuity of \$2500 for her life.<sup>136</sup> The marriage occurred as planned, and the payments began on the day of marriage and continued until 1912. At that point, suit was brought by a third party to whom the Count and Blanche had assigned their claim.<sup>137</sup>

As in *Allegheny* and *Wood*, the defense argued that the promise was unenforceable for lack of consideration. In this case, though, it was clear that normally marriage could be adequate consideration for such a promise.<sup>138</sup> The problem was that since Gulinelli was already engaged to marry Blanche, his performance of that promise allegedly could not constitute consideration for Schweizer’s promise, since performance of a pre-existing duty generally cannot count as consideration for some other promise, even if that promise is made by a third party.<sup>139</sup> Cardozo bypassed this difficulty by arguing that the promise was, by implication, made not only to Gulinelli, but also to Blanche.<sup>140</sup> While Gulinelli and Blanche were each obligated to the other to marry, they were obligated to no one else and together were free to rescind their agreement with each other if they chose. Cardozo argued that the promise was made to both of them to induce them to go through with the marriage, rather than “by common consent [] terminat[ing] their engagement or [] postpon[ing] the marriage.”<sup>141</sup> Their subsequent marriage constituted acceptance of Schweizer’s unilateral offer.<sup>142</sup>

Once again, it is tempting to conclude that Cardozo was simply finding a way around the formalities of contract law in order to rule for a sympathetic plaintiff. Arthur Corbin, for example, thought Cardozo reached the right result but through the wrong reasoning, again arguing that the result was or should have been decided on the grounds of

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unqualified to imagine the context in which promises to marry are carried out or broken.

<sup>135</sup> *De Cicco*, 117 N.E. at 808.

<sup>136</sup> *Id.* The agreement was written in Italian, and a later article added that the payments were to be made by Schweizer’s wife in the event of his death. *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 808-09.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 809.

<sup>142</sup> *Id.* at 809-10.

promissory estoppel rather than consideration.<sup>143</sup> Someone out to rule for a sympathetic plaintiff in this case could also have easily relied on the common law's longstanding tradition of favoring marriages. Although Cardozo touched on this ground in passing at the end of the opinion,<sup>144</sup> it is incorrect to suggest that it was the primary motivation for his decision, or, as Kaufman says, the "key policy reason for enforcing the Schweizers' promise."<sup>145</sup> Looked at from the point of view of the parties at the time of the transaction, it is not a stretch to call the exchange a bargained-for transaction between Schweizer and the young couple.

First, it is crucial that the offer made was a unilateral offer (i.e., an offer which could be accepted only by performance) rather than a bilateral offer (which could be accepted by return promise).<sup>146</sup> Although the wording of the agreement does not make the distinction,<sup>147</sup> it is clear that Schweizer sought the actual marriage and not merely a promise by Gulinelli to marry Blanche. Indeed Gulinelli never made such a promise to Schweizer.<sup>148</sup> Had Schweizer only been seeking Gulinelli's promise, Gulinelli clearly could have given it without Blanche, but instead, Schweizer sought the marriage. As Cardozo put it, "[i]t would not have been enough that the Count remained willing to marry."<sup>149</sup> Since Gulinelli clearly could not marry Blanche without her consent, it makes sense to suppose that the promise was made to both of them instead of just Gulinelli, even though only he is mentioned in the document.<sup>150</sup> "The plain import of the contract is that his bride also should be willing, and that marriage should follow. The promise was intended to affect the conduct, not only of one, but of both."<sup>151</sup> And as Cardozo also indicated, this point is made all the more obvious when we note that, although the promise was expressly made to Gulinelli, the money was to be paid to Blanche.<sup>152</sup> Since the promise was made to both of them and since

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<sup>143</sup> "A sound conclusion, if the purpose is to enforce a promise that was reasonably relied on; not so convincing, if intended to show that Joseph was making a bargain." Corbin, *supra* note 32, at 415.

<sup>144</sup> *De Cicco*, 117 N.E. at 810.

<sup>145</sup> KAUFMAN, *supra* note 5, at 326-27.

<sup>146</sup> *De Cicco*, 117 N.E. at 809.

<sup>147</sup> It just says (translated from the Italian) that Schweizer's promise is "in consideration of all that is herein set forth," presumably including the fact that Blanche "is now affianced to Count . . . Gulinelli." *Id.* at 808.

<sup>148</sup> *Id.* at 809.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*



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together they were free to rescind or modify their agreement if they chose to, their performing the marriage counted as adequate consideration despite the fact that they were already engaged.

Interestingly, Cardozo flirted with the idea that the promise may have been enforceable even without an implied promise made to Blanche. Although it had been argued that in such cases there would have to be evidence that the promisee was at least willing to withdraw, Cardozo pointed out that such a requirement might not apply to contracts to marry since marriage contracts are so different from business contracts, saying, “[m]any elements foreign to the ordinary business contract enter into such engagements.”<sup>153</sup> But just as in his discussion in *Allegheny College* of how charitable subscriptions are often treated differently, he ultimately concluded that no special treatment was needed here. Schweizer’s promise just days before the wedding showed that he recognized that the two might waver, and thus he made his promise in order to “strengthen[] and persuade[]” them.<sup>154</sup>

Cardozo’s suggestion shows an acute awareness of the distinction between the context of promises to marry and the context of commercial transactions, a distinction that matters for our understanding of the substance of the transaction even if it does not influence which doctrines apply. In other words, even if we apply the same rules to marriage contracts as business contracts, the different contexts should inform our understanding of the parties’ intentions in particular cases, including whether, and to whom, they intended to be bound. Although the promise in *De Cicco* was similar in form to business promises, Cardozo recognized the likelihood that the entire transaction was probably a way for Schweizer to reassure his daughter and his future son-in-law. A similarly structured commercial transaction would be sure to name both promisees expressly, but a promise regarding marriage in 1906 might well have been made only to the groom even if it was intended for the care of both husband and wife.

This understanding of Cardozo’s thinking is reinforced by his personal correspondence to Arthur Corbin about the case. Again, Corbin had criticized the opinion, although not the result, arguing that the same result could have been better reached on the grounds of promissory estoppel and the public policy of enforcing marriages. But even in

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

private correspondence, Cardozo adhered to the view that the contract met the traditional formal requirements of contract law and insisted on the distinction between a promise made to induce Gulinelli not to break his promise to Blanche (something for which there was no evidence in this case) and a promise made to induce both not to rescind their agreement.<sup>155</sup> In a key passage from *De Cicco*, Cardozo emphasized that we must “look to the substance” of the transaction instead of just the “form of the promise.” He defended this stance in a letter to Corbin:

It is important, however, not to treat the mere form of the promise as controlling. Otherwise, the blackmailer could attain his end through ready means of evasion. We must look to the substance of the transaction. In determining what the substance was, I think it is an important consideration that the promise was for the benefit not of one party, but of both. There is nothing in the case in question to suggest the probability that the Count had threatened to break his promise. The implication rather is that the father appreciated the fact that husband and wife would need some aid in the battle of life, and that he promised this aid to them to induce them to proceed.<sup>156</sup>

Even in the face of an aggressive argument that broad considerations of justice and public policy would better support his ruling than a technical reading of contract doctrine, Cardozo stood on doctrine. At the same time, he insisted that the application of that doctrine be sensitive to context. We cannot expect a promise made by a father to help a daughter and her husband “in the battle of life” necessarily to look the same as a business promise. But while it may not look the same as a commercial promise, if the substance of the agreement is a bargained-for exchange as understood in that particular setting, all else being equal, the agreement should be enforced.

#### CONCLUSION: CARDOZO AND CONTEXTUAL FORMALISM

Grant Gilmore once argued that Cardozo so “delighted in weaving gossamer spider webs of consideration,” that he had rendered the term “consideration” “meaningless.”<sup>157</sup> In particular, Gilmore concluded that “a judge who could find ‘consideration’ in *DeCicco v. Schweizer* or in the *Allegheny College* case could, when he was so inclined, find consideration

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<sup>155</sup> KAUFMAN, *supra* note 5, at 327-28.

<sup>156</sup> *Id.* at 328.

<sup>157</sup> GILMORE, *supra* note 61, at 69.

anywhere.<sup>158</sup> Since Gilmore himself was no fan of the consideration doctrine, this assessment has an air of both insult and compliment, and the same could be said for Corbin's less radical critique of Cardozo's contracts jurisprudence.<sup>159</sup> Realists like Gilmore (and to a much lesser extent, Corbin<sup>160</sup>) who made it their mission to undermine classical formalism were eager to argue that, although Cardozo paid lip service to the formalities of contract law, his decisions were not really supportable on those grounds. Posner went further and openly argued — indeed, made it the thesis of an entire book on Cardozo — that Cardozo's real skill as a jurist was not legal analysis but rather rhetoric: the ability to figure out who ought to win a case and then fool enough of his colleagues on the court to go along by using his magnificent rhetorical gifts to couch his results in language pleasing to formalist ears.<sup>161</sup> Thus, while undermining Cardozo's stated reasoning of his decisions, such realists claim him as one of their own.

More sophisticated understandings of Cardozo and of the legal realist movement in general<sup>162</sup> recognize that these matters are not so simple. If we must place a historical label on his work, "pre-realist"<sup>163</sup> or "proto-realist"<sup>164</sup> would be more accurate, and indeed John Goldberg persuasively argues that "[p]resent-day scholars interested in developing an adequate anti-Realist theory of law. . . could hardly do better than to undertake a careful examination of [Cardozo's] work."<sup>165</sup> If it is tempting to think of Cardozo as an anti-formalist realist rather than as an anti-realist, it is only because we have inherited from the realists an uncharitable picture of formalism. The formalism characterized by its vigorous critics probably never existed and certainly was not the doctrine of those most famously painted as formalists. For example, Anthony Sebok has shown that Langdell and Beale, normally taken as two icons of formalism, actually shared more in common with the

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<sup>158</sup> *Id.*

<sup>159</sup> Corbin, *supra* note 32, *passim*.

<sup>160</sup> Corbin's own position in the historical debates between formalists and realists is itself quite debatable. See GILMORE, *supra* note 61, at 66-67.

<sup>161</sup> POSNER, *supra* note 4, at 125-43.

<sup>162</sup> One of the better historical accounts of American jurisprudence persuasively describes legal realism as more of a "mood" than a movement. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 4 (1995) ("There was no realist movement. Realism was nothing more than an intellectual mood.").

<sup>163</sup> See ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 76 (1998).

<sup>164</sup> DUXBURY, *supra* note 162, at 77.

<sup>165</sup> John C. P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1475 (1999).

classical positivist tradition than with what the realists called formalism.<sup>166</sup> Mark Movsesian has also recently shown that Samuel Williston was not the rigid formalist he is usually portrayed to be, but rather was much more sensitive to pragmatic concerns than is typically supposed.<sup>167</sup> It was easy for the realists to paint Cardozo as an anti-formalist when he tells us the law “has outgrown its primitive stage of formalism,”<sup>168</sup> but finding an actual theorist who can fairly be said to personify such a primitive form of formalism where “the precise word was the sovereign talisman, and every slip was fatal”<sup>169</sup> proves to be nearly impossible.

That said, it is well beyond the scope of this project either to develop a precise definition of formalism, classical or otherwise, or to decide how well such a label would fit Cardozo’s jurisprudence.<sup>170</sup> It is certainly true that Cardozo’s jurisprudence was not formalist in one contemporary sense, whereby the truth of legal propositions is determined by their abstract logical relationships.<sup>171</sup> Rather than discussing how accurately Cardozo could be called a formalist in the whole, I would like simply to look at one common description of classical formalism, understood as “mechanical jurisprudence.”<sup>172</sup> According to this understanding of formalism, the label “contextual formalism” might at first seem to be a contradiction in terms. It is commonly said that formalists decide cases based on logical deductions from abstract rules.<sup>173</sup> In its extreme

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<sup>166</sup> SEBOK, *supra* note 163, at 83-112. Grant Gilmore once said that “if Langdell had not existed, we would have had to invent him.” GRANT GILMORE, *THE AGES OF AMERICAN LAW* 42 (1977). Sebok shows that, in a sense, they did. SEBOK, *supra* note 163, at 83-112.

<sup>167</sup> Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207 *passim* (2005).

<sup>168</sup> *Wood v. Lucy*, 118 N.E. 214, 214 (N.Y. 1917).

<sup>169</sup> *Id.*

<sup>170</sup> The best comprehensive account of Cardozo’s jurisprudence I know of labels him a “pragmatic conceptualist.” He was a conceptualist because he took the content of legal concepts seriously, but a pragmatic conceptualist since he did not believe these concepts were anything other than the best attempt by lawyers and judges to make sense of the practical problems that law presents. See Goldberg, *supra* note 165, at 1473-75. Although conceptualism and formalism are often considered synonymous, this brand of conceptualism, at least, is in no way committed to the claim that legal concepts are grounded in natural law or are true in virtue of their logical relations. See Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 468-69 (2000).

<sup>171</sup> See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 22-46 (1995).

<sup>172</sup> The term “mechanical jurisprudence” dates at least back to the early legal realist Roscoe Pound. See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); see also Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935).

<sup>173</sup> These rules are sometimes said to be given a priori, but this further claim is more often made on behalf of the classical formalists by the critics than by the formalists

versions, formalism is completely insensitive to results, even absurd or unjust ones. In an oft-quoted passage, Christopher Columbus Langdell opined that the fact that contract's mailbox rule might in some cases "produce not only unjust but absurd results" was "irrelevant."<sup>174</sup> The term "formalism" today is often used as a pejorative, perhaps in large part because of such cavalier attitudes towards justice.<sup>175</sup> Cardozo himself was not such an extremist. For example, in *Allegheny College* he expressed a preference for precedent that, like the special treatment of charities, is "supported by so many considerations of public policy and reason" over the "symmetry of a concept [the classical formulation of the consideration doctrine] which itself came into our law, not so much from any reasoned conviction of its justice, as from historical accidents of practice and procedure."<sup>176</sup>

Stated less extremely, however, formalism's insensitivity to results may be more palatable. Frederick Schauer argued that the central feature of formalism is the claim that legal decision-makers are in some sense constrained by rules.<sup>177</sup> At least in this limited sense, Cardozo was a formalist. At the very least, his opinions displayed a respect for the formalities of contract law,<sup>178</sup> even when he had to hold his nose to do it. For example, in *Sun Printing*,<sup>179</sup> a controversial<sup>180</sup> case about a contract with allegedly indefinite terms, Cardozo noted that: "[t]he defendant is

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themselves. SEBOK, *supra* note 163, at 104. In other accounts the rules are discovered through a quasi-scientific examination of cases more akin to induction. *Id.*; Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 11-45 (1983). In any event, the aim of the present project is not the source of the abstract rules, but rather how they are to be applied.

<sup>174</sup> C. C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 20-21 (2d ed. 1880). For a charitable understanding of this passage and Langdell's formalism generally, see Grey, *supra* note 172, at 12.

<sup>175</sup> See, e.g., BRIAN H. BIX, A DICTIONARY OF LEGAL THEORY 69 (2004) ("The term ['formalism'] is usually used in a pejorative sense . . ."); WEINRIB, *supra* note 171, at 22 ("In contemporary academic discussion, 'formalism' is a term of opprobrium."); Thomas C. Grey, *The New Formalism* 1 (Stanford Law Sch., Pub. Law & Legal Theory Working Paper Series, Working Paper No. 4, 1999), available at <http://papers.ssrn.com/paper.taf?abstract=200732> ("It has long been an insult in sophisticated legal circles to call someone a formalist.")

<sup>176</sup> *Allegheny Coll. v. Nat'l Chautauqua County Bank*, 159 N.E. 173, 175 (N.Y. 1927).

<sup>177</sup> Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).

<sup>178</sup> For example, it is sometimes forgotten that Cardozo did at times refuse to enforce a promise due to a formal technicality such as lack of consideration, including the chestnut on past consideration. *Dougherty v. Salt*, 125 N.E. 94 (N.Y. 1919).

<sup>179</sup> *Sun Printing and Publ'g Ass'n v. Remington Paper and Power Co.*, 139 N.E. 470 (N.Y. 1923).

<sup>180</sup> Two judges dissented in the opinion, *id.* at 472 and the scholarly commentary on the case was divided. See KAUFMAN, *supra* note 5, at 659-60 n.27.

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trying to squirm out of a contract on very technical grounds. We sustained its position, though with avowed reluctance. If there is any reasonable way of holding its complaint good, I am sure we shall be glad to take advantage of it.”<sup>181</sup> Thus, Cardozo considered himself bound to the formal rules of contract even in some cases where they seemed to give an unjust, or at least unhappy, result.

But there is an even more formalistic and abstract version of contract law. According to this version, the rules of contract law not only bind judges even though the results may seem unfair, but they are also completely insensitive to particular facts. One account called this variety of classical contract doctrine “pure” contract law. As Lawrence Friedman put it:

[T]he “pure” law of contract is an area of what we can call abstract relationships. “Pure” contract doctrine is blind to details of subject matter and person. It does not ask who buys and sells, and what is bought and sold. . . . The abstraction of classical contract law. . . is a deliberate renunciation of the particular.<sup>182</sup>

This “one size fits all” approach to contract was first popularized by Langdell, who thought that the law could be reduced to a surprisingly small number of legal principles: “[T]he number of fundamental legal doctrines is much less than commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension.”<sup>183</sup> Presumably one could learn these few fundamental principles and grind out results without much regard for the idiosyncrasies of particular sets of facts.

Although Cardozo considered himself bound to some degree by the formalities of contract law, he could never be said to have been “blind to the details of subject matter and person,” and thus was not a formalist in this stronger sense. Cardozo *always* asked “who buys and sells, and what is bought and sold.” He did not ask who the participants were merely to decide the case (i.e., in order to favor a charity or to account for unequal bargaining power), but rather to understand better the nature of

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<sup>181</sup> KAUFMAN, *supra* note 5, at 323.

<sup>182</sup> LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 20 (1965).

<sup>183</sup> C. C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS: WITH REFERENCES AND CITATIONS* 11 (1871), *quoted in* WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 11 (1973).

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the transaction. If Langdell was right that there were few fundamental rules of contract, Cardozo nevertheless found many variations of those fundamental rules and applied them when appropriate to various factual scenarios. Cardozo's own stance toward the allegedly fundamental nature of these rules was obviously ambivalent at best: the "half-truth" is that the consideration doctrine requires a bargained-for exchange, but the "whole-truth" is that what counts as a bargained-for exchange will depend a great deal on "who buys and sells, and what is bought and sold."

He was, therefore, not out to undermine or erode the formalities of contract law. Instead, what we have seen in *Allegheny College*, as well as in *Wood* and *De Cicco*, is an insistence that these formalities be applied sensibly, with an understanding of the context in which the exchanges took place. The question is whether the parties, understanding their actions in light of the appropriate context, manifested an intention to be mutually bound to an agreement the court could enforce. We are not to choose between rigid formalities on the one hand and vague, open-ended justice on the other, but instead are to understand agreements the way the parties themselves understood them and then decide if such agreements meet the formal requirements of the law of contract.

In retrospect, this "conceptual but pragmatic"<sup>184</sup> approach should be neither surprising nor revolutionary. It may be that Cardozo's jurisprudence, like *Allegheny College*, is made harder rather than easier to understand by decades of legal theory and interpretation. Looked at through the lens of the twentieth century debate over consideration and promissory estoppel, the opinion may seem to be trying to accomplish more than it really is. Likewise, through the eyes of the twentieth century realist, Cardozo may have seemed to be more of a fellow traveler than he actually was. Labels aside, one lesson from Cardozo's contract jurisprudence is that respect for rules of contract enforcement need not entail a myopic stance toward the facts of a case. Thus, we stand to learn much by reading *Allegheny College* and cases like it, though not always for the reasons we are told.

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<sup>184</sup> Goldberg, *supra* note 165, at 1475.