

# Introducing Civil Law Students to Common Law Legal Method Through Contract Law

Charles R. Calleros

## I. Introduction

The Common Law Program at Université René Descartes in Paris introduces students trained in the civil law to common law doctrine and legal method through a series of English-language mini-courses offered every other week by visiting faculty from common law countries throughout the world. Beginning in the 2001-02 academic year through Fall, 2007, I had the honor and pleasure of teaching the opening course in this program.<sup>1</sup> My pedagogic goals in this course included:

- Introduce the students to fundamental elements of common law legal method in order to better prepare them for all the common law courses;
- Use the issue of reciprocal inducement, within the common law doctrine of consideration, as both a vehicle for developing facility with legal method and as an exercise in comparative law; and
- Expose students to both traditional and innovative American teaching techniques, as a further means of providing students with a comparative experience.

To meet these goals, I led the students in a number of interactive exercises, some of them set in non-legal contexts so that the students focused all their attention on the legal method those exercises illustrated. Whether set in legal or non-legal contexts, these exercises required students to recognize and accept uncertainty in legal disputes, appreciate the role of *stare decisis*, and develop opposing arguments from facts and precedent. Others who teach the common law method to students from other legal traditions, either abroad or in U.S. law schools, may find my experiences to be helpful.

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1. Beginning in Spring, 2008, I began teaching an introduction to comparative and international contracts and conflict of laws, offered each spring near the end of the common law program.

## II. Illustrating the Role of the Judicial Branch... Mostly Through Metaphor

As a consequence of the dictates of *stare decisis*, lawyers in common law systems spend a good deal of their professional time arguing whether precedent is squarely applicable and controlling, or at least analogous; whether instead it is distinguishable; or whether—even if squarely applicable—it is obsolete and should be replaced. This special attention to precedent may seem foreign to students of the French system. There, the *Cour de Cassation*—the court of last resort on civil obligations—can depart from its prior rulings without explaining its change of course, and a lower court can refuse to follow a decision of the *Cour de Cassation*, in a bid to persuade the high court to reconsider its interpretation of a code provision while meeting in plenary session.<sup>2</sup>

To help civil law students fully grasp the role of precedent in the common law system, I strive to illustrate fundamental concepts with vivid images and illustrations. These illustrations are most effective when they are set in universally familiar contexts to which students trained in another legal system can readily relate.

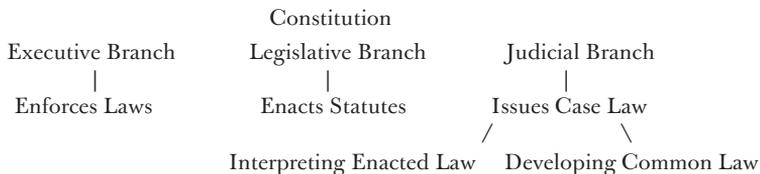
### A. Pedagogy

#### 1. Mixing Metaphor with Legal Examples and Exercises

To effectively communicate my ideas within the confines of an introductory course compressed into a single week, I have liberally employed metaphor. By setting the metaphors in non-legal contexts, students can focus all their attention on the method, rather than new legal rules. When mixed with examples and exercises set in legal contexts, these non-legal illustrations can help to foster a deep understanding of the common law legal system, an understanding that transcends the ability to invoke words with uncertain meanings.

#### 2. Explaining the Role of the Courts in the United States

Before employing metaphor, I use an overhead projector to display this simple chart of the roles of the branches of government in a state and the federal government of the United States:



2. See Eva Steiner, *French Legal Method* 80-81, 85-86 (Oxford Univ. Press 2002); John P. Dawson, *The Oracles of the Law* 424 (Greenwood Press 1978) (referring to “some isolated but dramatic instances in which the resistance of lower courts...had induced the Court of Cassation to overrule itself”).

This chart is admittedly oversimplified, particularly in its characterization of the work of the executive and legislative branches. My pedagogic reason for using it, however, is to illuminate the work of the judicial branch. When an appellate court reaches its decision in a dispute and publishes its opinion, it creates precedent that amounts to a primary source of law. I encourage the students to refer to this as “case law,” underscoring the way in which it contrasts with law found in the text of codes and with judicial decisions in the French civil law system, which have no formal status as a primary source of law.<sup>3</sup> They learn that U.S. case law sometimes interprets and applies constitutional, statutory, or regulatory law, or some combination of these types of “enacted law.” Alternatively, case law sometimes creates, abandons, or further refines common law rules. Those rules are developed by judges within parameters permitted by constitutional law, and subject to displacement by statutes, but otherwise lie within the control of the judicial branch. In many disputes, case law will address multiple issues that call for analysis of both enacted law and common law.

### 3. Illustrating the Relationship Between Statutory and Common Law

With my first metaphor, I set out to help civil law students understand how case law develops incrementally, case by case, and how common law relates to statutory law. With an overhead projector, I display a depiction of the surface of an ocean, covered with hundreds of small waves or swells. Each wave represents a single judicial opinion developing the common law. Each such opinion announces the narrowly circumscribed case law that results from the resolution of a particular dispute. If students study a series of related cases, represented by a group of waves in the metaphor, they can gain a fuller picture of the common law on any given topic, finding patterns and relationships in the case law.

This judge-made common law can be modified or displaced by statutory law, represented in the illustration by islands that cover parts of the ocean’s surface, where “common law” waves might otherwise appear. Two centuries ago, most of the law in the United States was judicially crafted common law. As represented by a depiction of a segment of the ocean with only two “legislative” islands displacing the “common law” waves, early 19<sup>th</sup> century legislatures superseded the common law only occasionally with isolated statutes that reflected legislative dissatisfaction with particular common-law rules.<sup>4</sup>

3. See Dawson, *supra* note 2, at 390–93 (explaining the 19th century exegetical school of thought, which advanced the view that the Code Civil is comprehensive and the legislature is the sole-lawmaking authority); cf. Mitchel Lasser, Judicial (Self-) Portraits: Judicial Discourse in the French Legal System, 104 Yale L.J. 1325, 1344–55 (1995) [hereinafter Lasser, Portraits] (discussing modern theory that French judicial decisions create “legal norms,” although they do not amount to an official source of law).
4. One famous American academic described statutes in this era as “warts on the body of the common law.” Karl N. Llewellyn, *The Bramble Bush* (7th ed., Oceana Pub. 1981). Widely scattered islands dotting an ocean provide the more attractive metaphor in my view.

By the latter half of the 20<sup>th</sup> century, however, an explosion of state and federal legislation and administrative regulations formed seemingly countless islands of enacted law covering a substantial proportion of the common law ocean. Some legislation took the form of code systems, such as criminal or commercial codes, designed to address whole fields of law in a relatively comprehensive manner. These can be represented by strings of islands, lined up in rows. However, gaps are visible between some of the islands in these strings where the common law ocean shows through. This image represents the norm in the common law system where statutory codes are not perfectly comprehensive and incorporate common law to resolve issues not addressed by statute.<sup>5</sup>

In sum, these oceanic representations employ metaphor to represent:

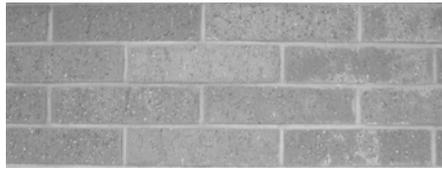
- the incremental nature of judicial law-making, one case (wave) at a time; and
- the increasing displacement of common law by legislation, thus narrowing the gap between common law and civil law systems; but
- in contrast to civil law systems, the role of judicially created common law as the primary source of law in many fields and as a gap-filler in fields largely governed by legislation.

#### 4. Illustrating Stare Decisis and Arguing from Precedent

##### A. BUILDING A WALL OF PRECEDENT, BRICK BY BRICK

A second metaphor helps explain how case law builds on a foundation of precedent. A projected photograph of a brick wall helps to illustrate how more recent cases, stacked near the top of the wall, follow the alignment of bricks previously laid in the bottom and middle portions of the wall.

5. See, e.g., UCC § 1-103(b) (2001) (The common law applies when not displaced by provisions of the code.). I recently used a different metaphor to illustrate the same concepts. A map of Manhattan, covered with tiny rectangles representing city blocks, served as a metaphor for a backdrop of common law, consisting of hundreds or thousands of common law judicial decisions, each such “block” announcing a tiny part of the law. On top of that backdrop, I dropped a few bite-sized chocolates wrapped in colorful foil, with the chocolate representing statutes that superseded the common law decisions that they covered up, and with the wrapping around each chocolate representing the gloss added by judicial decisions interpreting the statutes. Emptying a bag of the wrapped chocolates onto the map served to illustrate the explosion of legislation over the last 200 years. Still, the chocolates left parts of the map exposed, even in small gaps within a line of chocolates representing consecutive sections of a code system such as the Uniform Commercial Code. The gaps, which allowed the city blocks to partially show through the line of chocolates, illustrate the absence of a claim of comprehensiveness by codes in our common law system, as well as the continuing force of the common law whenever it is not displaced by legislation.



Many of these bricks represent judicial decisions that address issues arising under common law rules. Bricks of a different size or color could represent judicial decisions that interpret statutes, statutes that have displaced common law rules. Whether advancing the common law or engaging in statutory interpretation, each “brick” of case law is subject to the rules of *stare decisis*. A court could decide to overrule its own precedent, and thus turn the brick wall in a new direction, but it would do so only for good reasons that outweigh the policies of certainty, predictability, and fairness that underlie *stare decisis*.



#### B. RULES FOR LINA: SYNTHESIS OF CASE LAW AND APPLICATION TO A NEW CASE

In a final metaphor,<sup>6</sup> students follow a parent’s development of rules regarding the evening social activities of her teenage-daughter Lina, portrayed in series of four videotaped “cases.”<sup>7</sup> In each case, the parent reacts to Lina’s actions during that evening by announcing whether she is pleased and stating her reasoning. The parent thus develops her rules incrementally, case by case, in common law fashion.

In the first case, Lina’s mother is plainly displeased when Lina comes home on Friday night at 11:15 p.m., but the mother’s scolding does not clearly identify

6. When I have time, I also perform an exercise that uses the non-legal context of an employee’s task in a grocery store to illustrate statutory interpretation, the need to examine the rationale of precedent, and the techniques of drawing analogies and distinctions. For an extended discussion of this exercise, which I call “The Grocer’s Problem,” and its role in illustrating legal uncertainty, see Charles R. Calleros, *Law School Exams: Preparing and Writing To Win* 36–41 (Aspen Pub. 2007) [hereinafter Calleros, *Law School Exams*]. This exercise was adapted and expanded from one developed by Professor Elisabeth Keller at Boston College Law School. See Jane Gionfriddo, *Using Fruit To Teach Analogy* (The Second Draft: Bull. of the Legal Writing Inst., Tallahassee, FL), Nov. 1997, at 4.
7. The video and a guide to the cases are posted online, *available at* [law.asu.edu/rulesforlina](http://law.asu.edu/rulesforlina), and is discussed in greater detail. See Calleros, *supra* note 6, at 49–54. This exercise is based on an earlier exercise and video, *Monica’s Rules*, *available at* [www.hnbf.org/monicarules.aspx](http://www.hnbf.org/monicarules.aspx), and it is presented as an exercise in Charles R. Calleros, *Legal Method and Writing* 145–47, 181–82 (6th ed., Aspen Pub. 2011).

which facts were critical to her assessment. Did Lina transgress because she returned home after 11:00 p.m.; because she went to a particular pizza parlor after the football game (a pizza “hang-out” which, given her mother’s reaction, she may disapprove); because Lina failed to inform her mother after the football game that she was going out for pizza, so that her mother didn’t know where she was after 9:30 p.m.; or because of a combination of these factors? Several interpretations are reasonable, illustrating the ability of attorneys to construct competing arguments about the reach and rationale of a precedent.

The students soon learn that ambiguity in a court’s precedent may be cleared up when that court decides another case on different facts while addressing the same or a similar issue. In the second case, occurring the following Friday night, Lina repeats precisely the same behavior, except that she uses her cell phone to inform her mother of her plans to go to the pizza parlor after the football game. Her mother expresses no disapproval when Lina returns at 11:15 p.m., showing that Lina’s mother was not concerned about the pizza parlor and was not imposing a curfew of 11:00 p.m., but just wanted to know of Lina’s plans. By synthesizing two cases, students gain a clearer understanding of the rule that Lina’s mother is developing.

In the third case, Lina discovers from a scolding that she is indeed subject to a curfew: midnight. In the process of conveying this “ruling,” Lina’s mother also expresses her motivations (policy considerations) for imposing rules: She wants Lina to limit risks to her safety and to save sufficient time for adequate sleep and homework. By adding this case to the synthesis, students add a second branch to the rules (a curfew, as well as a notice requirement) and gain an appreciation for the policies underlying the two-part rule.

In the fourth case, Lina’s mother permits—indeed, requires—Lina to accompany her to a relative’s wedding and reception that lasts past midnight, in apparent violation of the curfew rule established in the third case. Once students overcome their collective impulse to characterize the mother’s decision-making as wholly arbitrary, they synthesize the third and fourth cases to recognize an exception to the curfew rule, one that is triggered by an event whose significance outweighs the importance of returning home by midnight to catch up on sleep (because her mother is also attending, we can assume that such an event does not pose any risks to Lina’s safety). Although it’s not clear from this single case what kind of event will trigger this exception, we know only that this one was exceptional: an important family event, which both Lina and her mother were expected to attend. Whether the exception would be triggered by an event of lesser importance that Lina and her mother attended, or by a family event Lina attended without her mother, is a question left to the next case.

The students encounter the “next case” in the form of an essay examination question. The question posits that Lina and her date returned to Lina’s home at 11:55 on Friday night in the date’s car. They pulled into the driveway and sat, holding hands and talking for twenty minutes before Lina exited the car and walked into her house at 12:15 a.m. Lina’s mother, sitting near a window, had

watched the couple as they sat in the parked car. On Saturday, Lina wants to watch her brother play basketball in another city, accompanied by a friend and her friend's parents. Lina would not return home until after midnight, and her mother will not attend this game.

Students are asked to orally debate whether Lina's activities on Friday night and her plans for Saturday night are consistent with the rules her mother developed in the four previous cases. They should be able to identify arguments for both sides of the questions whether Lina violated the curfew rule on Friday and whether the planned event on Saturday night has the qualities required to trigger an exception to the curfew. While developing and articulating their arguments, and by listening to the arguments of other students, all students should become keenly aware of the uncertainty in the outcome of each issue in the face of facts that fall outside the holdings of the precedents, and in light of the way policy considerations can be marshaled to support either side of a dispute. For example, on the question of whether Lina's arrival in her driveway before midnight satisfies her curfew, the goal of ensuring Lina's safety might be satisfied by the fact that her mother could see her daughter, but the policy of reserving time for sleep and homework presumably cannot be fulfilled except by Lina dismissing her companion and walking through the front door by midnight.

### C. ILLUSTRATION IN A LEGAL CONTEXT: *CALIFORNIA V. CARNEY*

If all goes well, the preceding exercises and illustrations in non-legal contexts should pique students' interest and help them secure a working knowledge of fundamental concepts of legal method. Again, it facilitates such comprehension by focusing the attention of students exclusively on concepts of legal method, even though through metaphors, without diverting that attention to the content of legal rules.

To test the students' ability to transfer this knowledge to legal problems, I introduce a trio of Supreme Court cases that vividly illustrate the legal uncertainty often inherent in analogizing and distinguishing precedent and in applying them to a new dispute. The cases all require interpretation and application of the Fourth Amendment to the U.S. Constitution, which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The very general term "unreasonable searches" invites debate about the level of government intrusion that exceeds reasonable official action in various contexts. Moreover, although the second clause states the standards for issuance of a judicial warrant, it does not explicitly identify the circumstances in which a warrant is a constitutional prerequisite to a search or seizure. Accordingly,

the amendment leaves ample room for judicial interpretation in various contexts. In light of the state's interests in maintaining order and ensuring safety in public schools, for example, the Supreme Court has held that the Fourth Amendment normally permits school officials to search students and their possessions without a warrant and on the basis of reasonable suspicion of wrongdoing, rather than the more demanding standard of probable cause.<sup>8</sup>

My classroom exercise focuses on a pair of decisions from 1925, in which the Supreme Court decided that—assuming probable cause to search—government officials generally need a warrant to search a house or apartment (*Carroll*), but not to search an automobile stopped on the highway (*Agnello*).<sup>9</sup>

I then use the following chart to ask students a question that was posed to the judiciary more than sixty years after *Carroll* and *Agnello*: Does the Fourth Amendment require police to obtain a judicial warrant before searching a fully mobile motor home that is parked in a public area and that serves as the criminal suspect's residence? I help students visualize the application of precedent to this case with the following chart:

<b>Precedent (1925)</b>	
<i>Carroll v. U.S.</i>	<i>Agnello v. U.S.</i>
No warrant required to search automobile	Warrant required to search apartment
<b>New Case (1986)</b>	
<i>California v. Carney</i>	
Officers conducted warrantless search of motor home parked in supermarket parking lot.	
Defendant was living in it, and it was fully mobile.	

This chart shows vividly how the new case, *Carney*, sits squarely between the two precedents. The motor home in *Carney* shares characteristics of both the automobile in *Carroll* and the apartment in *Agnello*. Accordingly, *Carney* provides a rich opportunity to frame arguments for analogizing or distinguishing the precedent on the basis of factors that speak to values balanced in the Fourth Amendment.

8. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (upholding search of student's purse under this standard); *see also* *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009) (even under this less demanding standard, finding that the strip search of a middle-school student was unreasonable and thus unconstitutional in all the circumstances, although granting the defendants immunity from damages because the law had not been clearly established at the time of the search).
9. *Carroll v. United States*, 267 U.S. 132 (1925) (approving warrantless search of car); *Agnello v. United States*, 269 U.S. 20 (1925) (excluding evidence obtained from warrantless search of an apartment), *overruled in part by* *United States v. Havens*, 446 U.S. 620 (1980) (limiting *Agnello* on a point dealing with using illegally-seized evidence for impeachment purposes).

To explore these themes, I divide the class into two sections, assign each section to advocate for a side in the dispute, and ask them to collaborate in small groups within each section to develop their arguments. In the ensuing debate, I play the role of judge and call on students to submit arguments and respond to each other's arguments.

The student prosecutors will invite me to recognize that the motor home is just as mobile as the automobile in *Carroll*, making it untenable for police to obtain a judicial warrant before searching it. They'll argue that probable cause to believe that the motor home contains evidence of a crime provides a sufficient basis for government intrusion in the circumstances. In sum, the legitimate needs of law enforcement are best supported by drawing an analogy to *Carroll*.

The student defense counsel, however, will argue that the analogy to *Agnello* is more apt. After all, the central purpose of the Fourth Amendment is to protect legitimate expectations of personal privacy from government intrusion. Because Carney resided in the motor home, he presumably kept his most personal possessions there and had the same high expectations of privacy in his motor home as Agnello did in his apartment. The police should not intrude on such privacy interests, argue the student defenders, without first demonstrating their probable cause before a judge and obtaining a narrowly drawn warrant.

My final lesson in this exercise is to assure students that neither conclusion is the indisputably "correct" one. Instead, the general language of the Fourth Amendment, coupled with its purpose of protecting privacy interests without unduly frustrating the legitimate goals of law enforcement, means that the outcome of cases like *Carney* will turn on the values held by judges and the weight that they give to competing policies.

In *Carney*, the California Supreme Court ruled 8-1 that the motor home was more analogous to the home in *Agnello* than to the car in *Carroll*. It reasoned that *Carroll* was distinguishable in a constitutionally significant way because of the greater expectations of privacy in a motor home than in an automobile, and it downplayed the constitutional significance of the similarity in mobility.<sup>10</sup> On *certiorari*, the U.S. Supreme Court reversed on a 6-3 vote, with the majority reasoning that the expectations in privacy in all motor vehicles—including ones serving as residences—are limited because of the pervasive government regulation of vehicles on streets and highways.<sup>11</sup> On that reasoning, *Carney* was analogous to *Carroll*, because—like any automobile—a motor home is both mobile and a place where expectations of privacy are limited.<sup>12</sup>

If we count up the votes, students can see that eleven able state or federal supreme court justices found that a warrant was required to search a motor home, while only seven justices supported the holding that became the law

10. *People v. Carney*, 668 P.2d 807 (Cal. 1983).

11. *California v. Carney*, 471 U.S. 386, 392-93 (1985).

12. *Id.* at 383-88.

of the land. Either conclusion was reasonable and supported by rational argument. The final result was not the product of cold logic, leading inexorably to a singularly “correct” answer. Instead, until the U.S. Supreme Court issued its ruling, the answer to this legal question was uncertain and dependent on the weights accorded to competing factors. And the final ruling in *Carney* became the “answer” not because the U.S. Supreme Court’s analysis was indisputably more compatible to Fourth Amendment values than that of the California Supreme Court; it became the answer because the U.S. Supreme Court is the court of last resort on federal questions.

After completing this exercise, I hope that civil law students have a better understanding of the common law mind. Civil law students are apt to think of a code as providing an answer to any dispute regarding civil obligations, even if such application requires extrapolation from companion provisions or enduring underlying principles.<sup>13</sup> In contrast, the common law system more openly concedes the indeterminacy of enacted law. *Carney* helps to convince students of the acknowledged uncertainty in the American system when general or incomplete constitutional or statutory text is judicially applied to specific facts. The case also illustrates uncertainty in the process of analogizing and distinguishing judicial precedent when the precedent is applied to new facts.

The natural next step is to explore a legal doctrine that is exclusively the product of judicially created common law, identifying how common law precedent can be equally indeterminate. This purpose is served well by the common law doctrine of consideration as a requisite to contract formation.

### III. Cause, Consideration, and Reciprocal Inducement

To continue my exploration of common law legal method, and to introduce a substantive issue of comparative contract law, our course next explores the doctrine of consideration as a common law requisite to enforcement of promises. This concept represents “common law” in two senses: First, consideration is a requisite to contract formation in common law systems, as contrasted with civil law systems. Second, it is almost entirely a product of judicial creation and development, as part of the brickwork of English and American common law rules created by the judiciary, as contrasted with the enacted law that springs from statutes, regulations, and constitutional provisions.

13. See *supra* note 3. The German scholar Savigny doubted that a code could comprehensively anticipate “every case that may arise,” because “there are positively no limits to the varieties of actual combinations of circumstances.” Frederick Charles von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* 38 (Abraham Hayward transl., The Legal Classics Library 1986). Nonetheless, Savigny cleverly used an example from geometry to describe the technique that judges might use to apply code provisions and underlying principles to resolve any dispute: “In every triangle...there are certain data, from the relations of which all the rest are necessarily deducible: thus, given two sides and the included angle, the whole triangle is given. In like manner, every part of our law has points by which the rest may be given: these may be termed the leading axioms.” *Id.* at 38–39.

To be sure, absence of consideration is seldom raised in litigation, because it is so routinely satisfied in the kinds of commercial transactions that make up the bulk of litigated cases. Still, consideration is a fundamental element of contract formation in the common law system,<sup>14</sup> and it contrasts in an interesting way with the doctrine of *cause* in the French Civil Code.

Both *cause* and consideration reflect a reluctance to enforce all promises and an attempt to rationally define which ones deserve the attention of the enforcement machinery of the courts.<sup>15</sup> In drawing that line, however, they differ in their treatment of gratuitous promises.

#### A. The French Code Civil's Requirement of Cause

Article 1108 of the French *Code Civil* provides that contract formation requires the four elements of consent, capacity, an object forming the subject matter, and a lawful cause:

*Quatre conditions sont essentielles pour la validité d'une convention:*  
*Le consentement de la partie qui s'oblige;*  
*Sa capacité de contracter;*  
*Un objet certain qui forme la matière de l'engagement;*  
*Une cause licite dans l'obligation.<sup>16</sup>*

The fourth requirement of cause is peculiar to the legal systems derived from the French Civil Law. It originated in Roman texts but was principally derived from the concept of *causa* developed in Canon Law.<sup>17</sup>

In some ways, the French concept of cause appears to be more demanding than the common law concept of consideration, but only because it acts as a vessel for several restrictions on enforceability that are addressed as separate doctrines in the common law. For example, Article 1108's express requirement that the cause be "*licite*," coupled with a companion provision's definition of "*licite*,"<sup>18</sup> incorporates a limitation on contract formation that corresponds

14. See, e.g., Restatement (Second) of Contracts § 17 (1979) (entitled "Requirement of a Bargain" and requiring consideration as part of the bargain).
15. E. Allan Farnsworth, Contracts § 1.5, at 11 (4th ed., Aspen Pub. 2004) ("No legal system has ever been reckless enough to make all promises enforceable"); Barry Nicholas, The French Law of Contract 118 (2d ed., Clarendon Press 1992) (referring to the recognition in France that "there must be some limit" to the principle that "agreements should be observed"); J.H. Baker, An Introduction to English Legal History 339 (4th ed., Butterworths 2002) [hereinafter Baker, Legal History] (quoting from a 16th century case explaining that the requirement of consideration protected one from being responsible for words spoken without deliberation); Oliver Wendell Holmes, Jr., The Common Law 253 (Dover ed., Dover Pub. 1991) ("Our law does not enforce every promise which a man may make.")
16. C. Civ. art. 1108 (101st ed., Dalloz 2002) (Fr.); see The French Code Civil art. 1108 (John H. Crabb trans., rev. ed., Rothman 1995) [hereinafter Crabb trans.] (referring to "consent... capacity...[a]n object certain which forms the subject-matter of the engagement...[a] licit causa"); see also *id.*, Glossary, at 422-23 (equating cause with "causa" and defining "cause").
17. Nicholas, *supra* note 15, at 118.
18. Art. 1133 states: "La cause est illicite, quand elle est prohibée par la loi, quand elle est

roughly to common law defenses to enforcement based on violation of law or public policy.<sup>19</sup> The element of cause has been interpreted also to encompass limitations on validity that correspond roughly to common law defenses based on a mistake of fact or the other party's material breach.<sup>20</sup>

In an important way, however, the French requirement of cause is less restrictive on contract formation than is the common law requirement of consideration. Unlike the consideration doctrine, which requires an exchange,<sup>21</sup> the French Civil Code specifically recognizes charitable or gratuitous contracts,<sup>22</sup> in addition to ones that contemplate an exchange.<sup>23</sup> If the French concept of "cause" refers to a "reason" for entering into a contractual obligation,<sup>24</sup> the required reason can be the "promisor's *intention libérale*, i.e. his intention to confer a gratuitous benefit on the promisee."<sup>25</sup>

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contraire aux bonnes mœurs ou à l'ordre public." C. Civ. art. 1133 (101st ed., Dalloz 2002) (Fr.); Crabb trans., *supra* note 16, art. 1133 ("A *causa* is illicit when it is prohibited by law, or when it is contrary to morality or public policy."); see Nicholas, *supra* note 15, at 128-136 (discussing illicitness in cause).

19. See, e.g., *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 & n.14 (5th Cir. 2003) (arbitration agreement's bar on punitive damages in a discrimination case was unenforceable because it violated important remedial terms and policies of a U.S. employment discrimination statute); *Bovard v. Am. Horse Enters., Inc.*, 201 Cal. App. 3d 832, 247 Cal. Rptr. 340 (1988) (denying enforcement of agreement to purchase business that manufactured items that were not themselves illegal, but which facilitated illegal drug use, and which therefore violated policies underlying California drug laws).
20. See Nicholas, *supra* note 15, at 120-22, 125-26 (referring to cases of the Cour de Cassation finding absence of cause when, unknown to one or both parties, the subject matter of a contract or a central reason for contracting had ceased to exist at the time of contracting, or when one party seeks to excuse his performance because the other party has failed to perform); cf. Restatement (Second) of Contracts §§ 151-54 (1979) (contract voidable for mutual and unilateral mistake); *id.* at §§ 237-42 (discharge of remaining obligations for the other party's material breach).
21. See *id.* § 71 (1979).
22. Art. 1105 states: "Le contrat de *bienfaisance* est celui dans lequel l'une des parties procure à l'autre un avantage purement gratuit." Code Civil art. 1105 (101st ed., Dalloz 2002) (Fr.); Crabb trans., *supra* note 16, art. 1105 ("A *charitable* contract is one in which one of the parties procures for the other a purely gratuitous advantage"); see Nicholas, *supra* note 15, at 124-25 (discussing "gratuitous contracts" under the Code Civil).
23. See C. Civ. art. 1106 (101st ed., Dalloz 2002) (Fr.) ("Le contrat à *titre onéreux* est celui qui assujettit chacune des parties à donner ou à faire quelque chose"); Crabb trans., *supra* note 16, art. 1106 ("A contract for *valuable consideration* (*à titre onéreux*) is one which obliges each one of the parties to give or to do something"); see also C. Civ. art. 1102 (101st ed., Dalloz 2002) (Fr.) ("Le contrat est *synallagmatique* ou *bilatéral* lorsque les contractants s'obligent réciproquement les uns envers les autres"); Crabb trans., *supra* note 16, art. 1102 ("A contract is *synallagmatic* or *bilateral* when the contracting parties obligate themselves reciprocally towards each other").
24. Crabb trans., *supra* note 16, Glossary, at 422; Nicholas, *supra* note 15, at 118 ("cause" interpreted as "motivating reason or purpose").
25. Nicholas, *supra* note 15, at 124 (discussing cause for "gratuitous contracts").

This relatively expansive concept of cause reflects the Napoleonic *Code Civil*'s respect for the autonomy of the parties<sup>26</sup> and for the “moral principle that contracts should be observed.”<sup>27</sup> In contrast, the common law concept of consideration grew gradually out of a medieval system of common law writs that began with a decidedly restrictive view of enforceable obligations.<sup>28</sup>

*B. Common Law: Consideration as Bargained-for Exchange*

Modern consideration doctrine not only requires an exchange, but also a special reciprocal link between the elements of exchange.<sup>29</sup> According to the *Restatement (Second) of Contracts*, “[a] performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”<sup>30</sup> A plaintiff need not show

26. Article 1134 provides that the law generally will defer to the will and the agreement of the parties when executed in good faith: “Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi.” Code Civil art. 1134 (Fr.); Crabb trans., *supra* note 16, art. 1134 (“Agreements legally made take the place of law for those who make them. They may be revoked only by mutual consent or for causes which the law authorizes. They must be executed in good faith.”); see also Denis Mazeaud, *La Notion de Clause Pénale* § 53, at 43 (1992) (referring to the principle of *l'autonomie de la volonté* (autonomy of the will), a fundamental concept of French contract law).
27. Nicholas, *supra* note 15, at 118 (referring to the principle of *pacta sunt servanda*).
28. See, e.g., A.W.B. Simpson, *A History of the Common Law of Contract 199–220* (Clarendon Press 1975) (tracing the gradual development of *assumpsit*, a branch of trespass on the case, which provided greater flexibility than earlier, more restrictive forms of action in the early common law system).
29. See *Restatement (Second) of Contracts* § 71(1) (1979) (“To constitute consideration, a performance or a return promise must be bargained for.”).
30. *Id.* § 71(2) (1979).

that each party received a tangible benefit or profit from the other's promise or performance,<sup>31</sup> so long as each promise or performance was a genuine inducement for the return consideration:

[I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration.<sup>32</sup>

This requirement of reciprocal inducement, cemented into U.S. common law doctrine by Justice Oliver Wendell Holmes Jr. in the 19<sup>th</sup> century,<sup>33</sup> could be viewed as consideration's counterpart to *cause*, because it relates to a party's *reason* for contracting.<sup>34</sup> Unlike the *Code Civil's* embrace of an *intention libérale* as one type of *cause*,<sup>35</sup> however, a charitable motivation will not suffice for consideration.<sup>36</sup>

Holmes conceded that, in close cases, subtle changes of fact or factual inference could spell the difference between gratuitous promises on the one hand and exchanges with reciprocal inducement on the other.<sup>37</sup> This often subtle distinction can provide the basis for an engaging classroom exercise.

31. See, e.g., *Hamer v. Sidway*, 27 N.E. 256 (N.Y. Ct. App. 1891) (nephew's refraining from engaging in certain legal vices—or his promise to do so—in exchange for his uncle's promise to pay money, could satisfy the consideration requirement without the need to inquire into whether the uncle would benefit from such forbearance in the ordinary sense); Restatement (Second) of Contracts § 79 (1979) (denying any requirement of “gain, advantage, or benefit”); David Ibbetson, *A Historical Introduction to the Law of Obligations* 142 (Oxford Univ. Press 2000) (As early as the 1560s, the evolving consideration requirement became divorced from notions of benefit, requiring “a slightly looser conception of reciprocity.”). Of course, the exchanges in nearly all contracts result in tangible benefits to each party, such as delivery of valuable goods or services in exchange for money. Thus, although tangible benefits are not strictly required, and may not be strictly present in marginal cases, it is common for courts or commentators to loosely equate consideration with mutual benefits or detriments, or at least to suggest that benefits or detriments will suffice even if not required. See, e.g., Holmes, *supra* note 15, at 289–90 (“[I]t is said” that consideration can be “a benefit conferred by the promisee on the promisor, or any detriment incurred by the promisee.”).
32. Holmes, *supra* note 15, at 293. But the promise or performance need not be the sole inducement for the return consideration. Restatement (Second) of Contracts § 81 (1979).
33. Holmes, *supra* note 15, at 293–94.
34. See *supra* note 24 and accompanying text.
35. See *supra* note 25 and accompanying text.
36. See, e.g., *Kirksey v. Kirksey*, 8 Ala. 131 (1845) (judges on panel divided on whether to find consideration or a “mere gratuity” in relative's promise to provide house for widow and her children); *Stewart v. Tr. of Hamilton Coll.*, 2 Denio 403, 420–21 (N.Y. S. Ct. 1845) (“[A] promise founded on...mere motives of benevolence...is nothing more than the promise of a gift, and is not a legal contract.”); Baker, *supra* note 15, at 340 ([A] gratuitous promise to build a house is only a “*nudum pactum*.”).
37. Holmes, *supra* note 15, at 292, 293 (illustrating gray areas and noting that “the same thing may be consideration or not, as it is dealt with by the parties”).

### *C. Pedagogy—Exploring Consideration*

Rather than exploring the doctrine of consideration comprehensively, our short course focuses narrowly on the element of reciprocal inducement, so that we can take time to work with it actively. My goal is to use this issue as a vehicle for extending our study of common law legal method, with a dose of comparative law.

#### I. Past Services, Gratuitous Promises, and Justice

I provide the students first with most of the text of the American Law Institute's summary of the common law doctrine of consideration, representing that organization's synthesis of case law:

**§ 71. Requirement of Exchange; Types of Exchange**

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
- (3) The performance may consist of
  - (a) an act other than a promise, or
  - (b) a forbearance, or...<sup>38</sup>

Through hypothetical cases, we explore how the requirement of reciprocal inducement (summarized in subsections 1 and 2 of Restatement § 71 above) explains the absence of consideration in a past service for a new promise. Even if the past performance could be said to have induced the new promise, the inducement could not be reciprocal: The past service could not have been induced by a promise not yet in existence.<sup>39</sup>

This limitation in the application of the consideration doctrine raises questions of justice and morality, which the class explores in the 19<sup>th</sup> century American case *Mills v. Wyman*.<sup>40</sup> In that case, Levi Wyman, an emancipated adult, fell ill while travelling and was cared for and comforted by Mills until Levi Wyman's death about two weeks later. On hearing of this, Levi's father, Seth Wyman, promised in writing to pay Mills's expenses. When Seth breached this promise, Chief Isaac Justice Parker, writing for the Massachusetts Supreme Court, resisted the invitation to expand the doctrine of consideration to encompass Seth's promise.

38. Restatement (Second) of Contracts § 71 (1979).

39. Holmes, *supra* note 15, at 296; Arthur Linton Corbin, Corbin on Contracts § 196 at 283 (one vol. ed., West 1980) ("The promise certainly did not induce the giving of [past] consideration.").

40. 3 Pick. 207 (Mass. 1825).

Justice Parker deplored Seth Wyman's breach of promise<sup>41</sup> and implicitly recognized it as a breach of a moral obligation,<sup>42</sup> but he found no legal obligation to keep the promise. Seth Wyman's promise was not supported by consideration precisely because he had not requested Mills's services; Mills had acted solely on the basis of a sense of charity and not to exchange his services for a promise of payment.<sup>43</sup> Thus, Seth Wyman's promise was gratuitous and unenforceable. Ultimately, Justice Parker opted for certainty and predictability in the consideration doctrine, purchased at the expense of unfairness in special cases:

General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in *foro conscientiae* to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.<sup>44</sup>

True, the law of some states will enforce a promise based on the moral obligation arising out of a past service;<sup>45</sup> however, even those courts likely will limit that expansion of the consideration doctrine to cases in which the past service transfers a substantial benefit directly to the promisor, particularly when the service results in significant injury or other cost to the promisee.<sup>46</sup> Moreover, U.S. courts will universally recognize a claim in quasi-contract for restitution of the value of a service conferred on the defendant; however, that

41. *Id.* at 209 (“[The defendant] is willing to have his case appear on the record as a particular example of injustice.”).

42. *Id.* at 211 (“A deliberate promise...cannot be broken without a violation of moral duty.”).

43. *Id.* at 209.

44. *Id.* at 208–09. The court was compelled by precedent, however, to recognize a limited exception in the form of enforcement of a new promise to revive an obligation that once was part of a bargained-for exchange and that was extinguished by operation of law (such as bankruptcy or running of the statute of limitations) before its revival by the new promise. *Id.* at 211 & n.1.

45. *See, e.g.*, *Webb v. McGowin*, 168 So. 196 (Ala. Ct. App. 1935) (enforcing promise to pay support to an employee after the employee sustained permanent injuries while saving the promisor from death or serious injury); E. Allan Farnsworth, *supra* note 15, § 2.8, at 60–63 (citing to few cases but finding a trend in favor of enforcement); *but cf.* *Harrington v. Taylor*, 36 S.E.2d 227 (N.C. 1945) (denying relief in circumstances similarly compelling as those in *Webb v. McGowin*); Kevin M. Teeven, *Promises on Prior Obligations at Common Law* 115–123 (1998) (finding in 1998 that a promissory claim based on moral obligation was only a trend but predicting that a majority of states would eventually find it attractive).

46. *See, e.g.*, *Webb v. McGowin*, 168 So. 199 (Ala. S. Ct. 1936) (underscoring those points in denying review of the decision of the Court of Appeals).

doctrine is limited to cases in which the enrichment of the defendant is unjust, as when the plaintiff had reasonably expected compensation for the service, perhaps because of a special relationship between the parties at the time of the enrichment. It would not apply to a case in which the plaintiff had acted out of a sense of charity and had expected no compensation,<sup>47</sup> which likely was the case in *Mills v. Wyman*.

The *Mills* case, which represents a traditional view of consideration, presents an opportunity for the class to debate the relative merits of the common law consideration doctrine and the French *Code Civil*'s concept of *cause*. Why is the common law so hesitant to enforce gratuitous promises? Is it because exchanges are more likely to contribute to the creation of wealth, whereas gratuitous promises merely transfer wealth and thus can be left to the individual conscience?<sup>48</sup> Does such reasoning give too little weight to the moral value of keeping one's promises? Do supplementary common law doctrines, such as promissory estoppel and quasi-contract, suffice to address questions of fairness and justice to which the consideration doctrine fails to speak?

## 2. Factual Inference and Reciprocal Inducement

To further demonstrate indeterminacy in a legal rule when applied to close facts, the class turns next to another 19<sup>th</sup> century American case, *Kirksey v. Kirksey*.<sup>49</sup> In *Kirksey*, Antillico's brother-in-law, on hearing of the death of his brother, Antillico's husband, wrote the following letter to Antillico:

Dear sister Antillico—Much to my mortification, I heard, that brother Henry was dead, and one of his children. I know that your situation is one of grief, and difficulty. You had a bad chance before, but a great deal worse now. I should like to come and see you, but cannot with convenience at present.... I do not know whether you have a preference on the place you live on, or not. If you had, I would advise you to obtain your preference, and sell the land and quit the country, as I understand it is very unhealthy, and I know society is very bad. If you will come down and see me, I will let you have a place to raise your family, and I have more open land than I can tend; and on the account of your situation, and that of your family, I feel like I want you and the children to do well.<sup>50</sup>

Antillico abandoned her current residence and moved her household some sixty miles in reliance on the promise to provide her family a comfortable home, but her brother-in-law ultimately breached the promise before completing

47. See, e.g., Farnsworth, *supra* note 15, § 2.20, at 101-03.

48. See E. Allan Farnsworth et al., *Contracts: Cases and Materials* 32 (7th ed., Foundation 2008) (posing these and other questions).

49. 8 Ala. 131 (Ala. S. Ct. 1845). For a thorough examination of this case, see William R. Castro and Val D. Ricks, "Dear Sister Antillico...": The Story of *Kirksey v. Kirksey*, 94 *Geo. L. J.* 321 (2006).

50. *Kirksey*, 8 Ala. at 131.

performance. Although the trial court gave judgment for Antillico, the Alabama Supreme Court reversed on a divided vote, the majority finding no consideration for the brother-in-law's promise.<sup>51</sup>

The state supreme court provided no helpful reasoning supporting the conclusions of either the majority or the dissenting justice. Consequently, the opinion provides not so much an opportunity to interpret a common law precedent as to engage in original argument on the facts. To set up this exercise, I divide the class into two camps, each representing one side of the dispute, and I ask them to stipulate that Antillico's act of moving her family sixty miles could easily qualify as a performance and that Antillico was clearly induced by the brother-in-law's promise to move her household. Thus, at least if we apply modern common law rules and project them onto the court's analysis, we must conclude that the majority and dissent divided on the question of whether the brother-in-law sought Antillico's act of moving her household in exchange for his promise. If not, then the inducement was not reciprocal, and the brother-in-law's promise was gratuitous and unenforceable. With that stipulation, I ask the students to develop fact-specific arguments on the issue of the brother-in-law's inducement or lack of it, based on the statements in his letter and on factual inferences that a jury might reasonably draw from those statements.

After developing their arguments in small groups, students on either side raise their hands to advocate for their clients. A typical exchange proceeds as follows:

**Counsel for Antillico:** The jury correctly found consideration because the letter proposes an exchange: "If you will come down to see me, I will let you have a place to raise your family..." Moreover, the brother-in-law sought the presence of Antillico's family in exchange for the home, because he had "more open land than I can tend" and apparently hoped that more people on his estate might mean more hands tending the land. More subtly, the brother-in-law felt a social obligation to visit Antillico's family at the time of their loss, but he could not conveniently travel for the moment, and he thus sought the presence of Antillico's family at his estate to help him satisfy social expectations that he would join in the mourning for his deceased brother and would help provide for his brother's widow. Indeed, the tenor of the letter leads naturally to the inference that the brother-in-law was fond of Antillico and her family and that he sought the company of his deceased brother's family in exchange for his promise. Thus, the movement of Antillico and her family was something he desired, something he sought in exchange for his promise to provide them a place to stay.

**Counsel for the Brother-in-law:** The passage in the letter beginning with "If you will come down and see me," does not propose a bargained-for exchange; instead it simply states a necessary condition for Antillico to collect a gift. After all, the brother-in-law could not move his land to Antillico; she had to come to it. His charitable motivation is consistent with his recognition of

51. *Id.*

the challenges faced by Antillico's family and his statement that "I feel like I want you and the children to do well." Moreover, his statement that he had more land than he could tend is reasonably interpreted as a graceful way of assuring Antillico that his promised gift would not impoverish him. True, the letter suggests that the brother-in-law would feel some sense of satisfaction if Antillico accepted his promised gift. However, that feeling of goodwill accompanies any promise to make a gift. Such an *intention libérale* could satisfy the *Code Civil's* requirement of *cause*, but it does not help satisfy the common law requirement of reciprocal inducement as an element of consideration.

The development and articulation of these and other possible arguments provides the students with

- experience working with fact-specific advocacy;
- a vivid illustration of the indeterminacy of a common law rule such as reciprocal inducement; and
- another opportunity to question the justice of the consideration doctrine's exclusion of gratuitous promises.

With respect to indeterminacy, I inform the students that the question presented in *Kirksey* does not have a certain answer, but depends on factual inferences drawn by the fact-finder. In my view, the appellate court should have deferred to the fact-finding of the jury, but that point of appellate standard of review is distinct from the application of the consideration doctrine. If the debate is viewed as one of closing argument to the jury, rather than argument before the appellate court, this problem of standard of review can be avoided.

With respect to the justice of denying Antillico a remedy, the class can once again ask whether the common law draws the correct line by finding that conditional gratuitous promises lack consideration. True, promissory estoppel would provide Antillico a second claim for recovery today. However, it is not clear that this second theory was available to Antillico in Alabama in 1845.<sup>52</sup> Moreover, even applying modern theories of promissory estoppel, it's not clear that Antillico would qualify for relief, because she apparently abandoned her residence without heeding her brother-in-law's advice to liquidate the interest in her existing residence.<sup>53</sup> Thus, she might have unforeseeably and unreasonably created her own economic plight by simply abandoning her home when she moved to her brother-in-law's estate.<sup>54</sup>

52. The Nebraska Supreme Court, for example, recognized a claim for promissory estoppel in the 19th century, but not until more than half a century after the decision in *Kirksey*. *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898). See also Corbin, *supra* note 39 § 194, at 280-81 (discussing how the resistance of Holmes and other judges to the promissory estoppel theory was eventually overcome by the American Law Institute's embrace of the doctrine, with Corbin's support).

53. *Kirksey*, 8 Ala. at 131.

54. See, e.g., Restatement (Second) of Contracts § 90 (1979) (requiring foreseeable reliance and an injustice); Corbin, *supra* note 39 § 200, at 288-91 (discussing "Limits of the Action

### 3. Analogy and Distinction: Three Cases

Finally, I invite students to review the material on consideration, and to compare and synthesize cases in an entertaining fashion by showing a video that presents three “cases” in which a promisor breaches a promise to pay \$10,000 to a friend or relative. I usually show a French-language version of this video, acted by a French family who lived next door to me in Arizona for several years, but only after the students have studied an English script of the video. By allowing the students to view a video enactment in French, I provide the students with an opportunity to test their own translations of the English text, and I ensure that they can devote full attention in class to the subtle legal issues without simultaneously dealing with nuances in English-language dialogue.

Following is the English-language translation that students are assigned to read and analyze before they view the French-language video:

#### **Case #1: Disappointed Expectations**

*On Friday afternoon, Jean-Michel opens the door to greet Brigitte.*

**Jean-Michel:** Hello, what a nice surprise. I was just thinking about your family.

**Brigitte:** And we were thinking about Muriel’s party tonight. Here’s a nice cake for her to serve.

**Jean-Michel:** You are too kind. And how is Henri?

**Brigitte:** Still ill, but he is recovering. He’s excited about my plan to open the bakery.

**Jean-Michel:** But Muriel tells me that you are still having trouble getting a loan from the bank?

**Brigitte:** Unfortunately, yes. All I need is \$10,000 to get it started.

**Jean-Michel:** Yes, I heard as much. Well, your timing is perfect. We just finished writing this get well card for Henri. But we have a card for you as well, in honor of all you have done for us over the years.

*The card reads:* “Brigitte, good luck with your new bakery. To help you get started, please allow me to make a donation of \$10,000.” [*signed by Jean-Michel*]

**Brigitte:** Really? Are you loaning me \$10,000?

**Jean-Michel:** Not a loan. This is a gift. If you are available this coming Monday, let’s meet at the bank at noon and arrange the transfer of funds.

**Brigitte:** I’ll be there. Thank you so much. We will never forget this. I will make you proud with this bakery.

*Later that day... Sophie, daughter of Jean-Michel, runs into the room, excited.*

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in Reliance Doctrine”); *cf.* Ricketts, 77 N.W. 365 (finding it “grossly inequitable” that the promisor breached a promise that induced reliance that the promisor contemplated as a “reasonable and probable consequence of his gift”).

**Sophie:** Dad! I just passed the driver's exam and got my license!

**Jean-Michel:** Congratulations!

**Sophie:** Guess what I want for my birthday! A car of my own!

**Jean-Michel:** Uh, oh.

*The next morning...Brigitte is on the phone.*

**Brigitte:** Hello, Jean-Michel. How are you?

**Jean-Michel:** I'm afraid I have some bad news.

**Brigitte:** Bad news?

**Jean-Michel:** Yes, Sophie finally passed her driver's exam, and now she wants a new car. I'm sorry that I won't be able to help out with your bakery after all.

**Brigitte:** But, Jean-Michel, you gave me your promise, and I am counting on you. After all, Sophie does not need a new car; she can borrow yours.

**Jean-Michel:** I know, but she's wants a cute, sporty model. I'm sorry; I hope this does not affect our friendship.

**Brigitte:** I share that hope, but I'm afraid that I must hold you to your promise.

\* \* \* \* \*

### Case #2: Reliance

*Same as above, except for the final phone call, which goes as follows:*

**Brigitte:** Hello, Jean-Michel. How are you?

**Jean-Michel:** I'm afraid I have some bad news.

**Brigitte:** Bad news?

**Jean-Michel:** Yes, Sophie finally passed her driver's exam, and now she wants a new car. I'm sorry that I won't be able to help out with your bakery after all.

**Brigitte:** But, Jean-Michel, when you promised me the money, I acted immediately. I entered into a lease on Main St. for the bakery, and I just purchased some expensive equipment on credit.

**Jean-Michel:** Well, then, I feel just terrible, but I cannot disappoint Sophie. I wish you luck.

**Brigitte:** I'll need more than luck. I'm afraid that I must hold you to your promise or I will be financially ruined.

\* \* \* \* \*

### Case #3

*Jean-Michel seeks to make peace with his brother, Francois:*

**Jean-Michel:** Hello, Francois, this is your brother, Jean-Michel. *(Pause, and Jean-Michel cringes at the response from the other side)*

**Jean-Michel:** Yes, I know you are still angry with me about our parents' will, but you can't avoid speaking with me forever. I want to set things right. (*Short pause*)

**Jean-Michel:** Listen, I know that you need \$10,000 to open a café. I would like to give you \$10,000 to get started. If you will just agree to meet me for lunch next Monday at Tomaso's Restaurant, we can go to the bank after lunch to transfer the funds. (*Short pause*)

**Jean-Michel:** You agree? Good, I'll see you Monday.

I hope that students conclude that Jean-Michel's promise in Case #1 is not enforceable under U.S. law. Although Jean-Michel's characterization of the promise as a gift may not be conclusive, it happens to be accurate despite some circumstances that might momentarily tempt students to find an exchange. The things that Brigitte "has done" for Jean Michel and his family over the years, including the cake delivered on the day of the promise, could not be consideration for the promise because they obviously were not induced by, nor were they exchanged with, a promise that was provided as a surprise only later by Jean-Michel. Moreover, Jean-Michel and Brigitte obviously are not estranged, so Brigitte's agreement to meet at the bank is almost certainly merely a convenient means of transferring the gift to Brigitte rather than a performance that Jean-Michel is seeking in exchange for his promise. A more definite promise by Brigitte to make her friends "proud with this bakery," such as a promise to meet certain standards of quality, could be consideration except that Jean-Michel did not seek such a promise in exchange for his promise and did not require it as a condition of making his promise. If this statement by Brigitte is a promise at all, it is a second and independent gratuitous one, rather than one that was exchanged for Jean-Michel's promise.<sup>55</sup>

Case #2 is identical except for the substantial reliance on Brigitte's part. Although we don't have time in the introductory course to study promissory estoppel in depth, I do expect students to at least spot the issue, and I ask them to question whether it was foreseeable that Brigitte would engage in such immediate reliance rather than simply wait a few days to secure the promised funds.

Case #3 presents students with an opportunity to synthesize Cases #1 and #3 on the issue of reciprocal inducement. In contrast to Case #1, does the obvious estrangement of Jean-Michel from his brother lead to an inference that Jean-Michel was bargaining for a meeting with his brother? Did he hope that a lunch meeting with his brother would provide him with an opportunity to patch up their differences? Was the prospect of meeting with Francois an inducement for Jean-Michel's promise to help finance his brother's café? If so, Case #3, in contrast to Case #1, could be a bargained-for exchange, even though it seems

55. Perhaps the strongest argument for a bargained-for exchange is that Jean-Michel's card and statements implicitly amount to an offer that requires Brigitte at least to use the money for a bakery within a reasonable time rather than save it or use it for some other purpose. Although Jean-Michel's characterization of the money as "a gift" suggests that no strings are attached, a student raising this argument earns positive feedback.

to share many of the characteristics of Case #1. This conclusion does not run afoul of the centuries-old notion that love and affection are not consideration for a promise.<sup>56</sup> If Jean-Michel promised to give \$10,000 to Francois simply out of a sense of love and affection for Francois and a desire that he succeed in living out his dream to open a café, Jean-Michel's promise would be motivated by the same kind of sense of charity that the majority of the Alabama Supreme Court found in *Kirksey*. Once Jean-Michel sought Francois's attendance at a meeting so that he could attempt to end their estrangement, however, Jean-Michel arguably was seeking a performance in exchange for his promise.

#### **IV. Conclusion**

When teaching the first visiting professor's course in the Common Law Program, I tried to help students grapple with differences in the civil law and common law legal systems, and particularly differences in basic legal methods, without unduly distracting students with substantive law. The course described in this chapter endeavors to meet that goal by introducing students to common law legal method with exercises set in universally familiar non-legal settings and then reinforcing those issues with exercises that permit active, in-depth exploration of a limited number of substantive issues. I hope that the students leave the introductory course well prepared and eager for further exploration of the common law throughout the year.

56. See Ibbetson, *supra* note 31, at 144-45 (historically tracing the occasional acceptance, and the more frequent rejection, of love and affection as consideration); J.H. Baker, *The Legal Profession and the Common Law: Historical Essays* 375-77 (The Hambledon Press 1986) (discussing the ultimate rejection of love and affection as consideration by 1588).