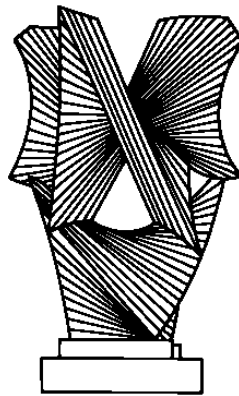


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The Katz Lecture 1992

RECONSTRUCTING CONTRACTS

Douglas G. Baird

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Mary noted that I began life as an English major. I was first drawn into the law because every case told a different story. Going to law school was better than reading Dickens.

Today I want to focus on what may be the most important story in the first-year contracts course. It begins on March 20, 1869. Samuel Story and his wife are celebrating their 50th wedding anniversary. Amidst this gathering of family and friends is one of their grandchildren, William Story 2d. An eager 15-year-old lad, Willie is the central character in our story. There are also many stodgy adults at this party. They include his rich uncle, William Story Sr., after whom Willie is named. Notwithstanding the grown-ups, Willie is enjoying himself. Little does Willie know that all his dreams of adolescent fun and adventure are about to disappear in a flash before his eyes.

Willie's uncle rises after dinner to speak. He announces that he will give Willie \$5,000 when he turns 21 if, but only if, Willie refrains from drinking, using tobacco, swearing, or playing cards or billiards for money until then.

Dreams die hard, but Willie abides by his uncle's demand for six long, dry years. He reaches his 21st birthday. He is glad that his adolescence is now over, damn glad. He goes to his uncle to collect. At this point, however, doubts enter his mind. What if the uncle refuses to pay? What if the uncle dies and his executor refuses to pay? Is the promise legally enforceable?

Willie's question about whether the uncle's promise is legally enforceable has been a central preoccupation of contracts professors for over seventy-five years. There is no other course in the law school curriculum in which the great debate remains one whose contours were more or less put in place before World War I. In addition, it is passing strange that contracts, a course that seems down-to-earth, should focus on the problems of Willie. Whatever else, they are not the problems the practicing commercial lawyer is likely to encounter.

In this year's Katz lecture, I shall focus on this case—*Hamer v. Sidway*—and the question it raises: Is the uncle's promise legally enforceable? I hope to accomplish three things.

1. First, I want to explain why this question is a hard and interesting one.
2. Second, I want to show why this case has been central in the evolution of the law of contracts over the last 100 years.

3. Finally, I want to argue that many recent scholars have failed to build on the insights of those who first focused our attention on this case. This failure has broad implications for the way we understand contracts and the law generally.

Let me start by explaining why we should find *Hamer v. Sidway* interesting. One of the most important questions we can ask about the law of civil obligations concerns the kinds of promises that are legally enforceable. Learning what promises are legally enforceable and developing intuitions about what promises we enforce is an important part of our legal education.

We share intuitions about the cases at the extremes. The promise of a giant corporation in writing to sell goods to another giant corporation should be legally enforceable. A casual promise one friend makes to another in a social setting—perhaps about meeting for lunch or dinner—should not be. It would be surprising if any modern legal regime provided otherwise. But those trained in the law must learn about the cases that fall between these two extremes. *Hamer v. Sidway* is one of these intermediate cases. The uncle's promise was not made in the marketplace. We cannot easily point to something such as the desirability of mutually beneficial trade to justify legal enforceability here. On the other hand, the promise is not a casual one. The whole point of the uncle's promise is for Willie to take it seriously. Therefore we should not necessarily treat the uncle's promise like an ordinary social promise.

There is no easy way to decide this case. The essence of a contractual obligation is that it is consensual. From this, it follows that much turns on the intent of the promisor. If Willie's uncle made it emphatically and abundantly clear that the promise was not legally enforceable, we would respect the uncle's wishes. If Willie's uncle wanted the promise to be legally enforceable, we should allow this to happen as well. The uncle, however, never made it clear whether he wanted this promise to be legally enforceable.

In the absence of some objective manifestation of the uncle's intent, an inquiry into intent is not likely to help us much. Indeed, the modern law of contracts begins with the idea that divining the subjective intent of someone like the uncle can't be our focal point. We can't live in a world in which the uncle is legally bound *only* if he subjectively intended to be legally bound. We have to live in a world in which you are bound when you promise to sell me cotton on the ship Peerless even if you meant a cotton on a ship called "Peeress." Legally enforceable obligations must turn on things that we can observe objectively. I cannot be held to know your private language. I cannot guess that when you say, "Pass the salt," you really want me to pass what I and everyone else calls pepper. We can't put Willie or judges in the position of trying to figure out what might have been on the uncle's mind.

Even if we could divine the uncle's thoughts at the time he made this promise, it would likely do us little good. The uncle probably never thought about the question of legal enforceability. Nor can we rely on how people usually think about it. The legal enforceability of the uncle's promise will become an issue only if something has gone seriously wrong. Recall *Anna Karenina*. All happy families are the same, but unhappy families are unhappy in different ways. Our intuitions about intent in the usual case may not tell us much about intent in the unusual case in which the promise is not kept. If we try to adopt as our legal principle that we are going to let everything turn on what the uncle probably intended, we are going to find ourselves in a world without clear landmarks.

The greatest danger of relying on the uncle's probable intent to guide us is that it will make us too smug and too comfortable with what we are doing. We shall purport to be answering the question, "What did the uncle intend?", but in fact we shall be continuing to ask the same question: Whether we think that it is a good idea that this promise should be enforced, given all the facts and circumstances. A mystical inquiry into intent will not help us to focus our intuitions.

Once we accept the idea that we would respect the intent of the uncle provided it was made sufficiently manifest, it might seem that the question we are facing, although hard, is simply not that important. Why won't parties be explicit if the issue really matters to them?

The barriers to reaching explicit agreement, however, may be large. An obvious problem is that parties must know a legal rule before they can bargain around it. In the hard cases such as *Hamer v. Sidway*, the parties often do not know the legal rule.

Even if the parties did know the legal rule, there might still be a problem. Assume that such promises are ordinarily not legally enforceable unless the uncle says otherwise. Put yourself in the position of Willie at this family gathering. Your rich uncle has just promised to give you a lot of money. The uncle is being praised for his generosity by your parents and all his friends. You are grateful, but you are a little nervous. Your uncle doesn't look that healthy and he may not remember to put all of this in his will. There is also the risk that he may change his mind for no good reason. You can't afford to go to college if you aren't sure you are going to get the money. Can you break into the festivities and ask, "Look, uncle, just so we are clear on this, are you legally bound to give me the money even if you look at me several years from now and have second thoughts?"

We would have a similar problem with the opposite rule. Imagine our presumption is that such promises are legally enforceable. The uncle has just made this promise, everyone is congratulating him, and he turns to his nephew

and says, “By the way, I may not keep this promise and, if I don’t, you can’t force me to keep it.”

There is a problem. The person that raises the issue about legal enforceability when the presumption is otherwise communicates information. The least reliable people, the uncle least likely to keep the promise, the nephew most likely to fall short in the eyes of the uncle, are the ones most likely to raise such questions. Merely asking such a question, even if it makes sense for everyone, reveals information that one of the parties does not want to reveal. The worst people won’t ask the question for fear of being uncovered as such. The better people won’t ask the question for fear of being mistaken for the worst ones. People may not bargain around an inappropriate default rule, even when it would make sense for them to do so. As it is, parties are sometimes content to leave matters ambiguous.

Now we could solve some of these problems by introducing formal rules. The touchstone for whether a promise was legally enforceable would be whether the promisor had followed a formal ritual. We might enforce only those promises that were written and signed before multiple witnesses or before a public notary or upon which we had impressed our seal. We could also have formal rules for certain classes of promises. Formal rules, however, are probably never going to be completely satisfactory. Life is too short and most of the time people keep their promises. Legal rituals tend to be costly and parties often don’t know about them.

Once we leave the realm of formal rules, we must confront the problem presented by cases such as *Hamer v. Sidway*. The parties did not make it clear whether the promise was to be legally enforceable. We then face a question that is central to understanding the law of contracts. We have wrestled with this question for over a century and it is worth tracing out the different approaches that people have brought to bear on it.

Let’s go back to 1870. Christopher Columbus Langdell has just been appointed to the Harvard Law School and he is preparing to teach contracts for the first time. Langdell sifts through hundreds of common law cases and tries to extract from them a simple principle that will tell us when a promise is legally enforceable. Langdell’s basic principle is easy to restate: A promise is legally enforceable if, but only if, it is supported by consideration. We enforce only those promises that are made in exchange for something else. A mere promise is not enforceable. (I promise to pay you \$10.) A promise that is subject to a condition is not enforceable (I promise to pay you \$10 if you are around when I get my next pay check.) A promise that is given in exchange for a benefit you confer on me or a detriment you incur on yourself is enforceable. (I promise to pay you \$10 if in

return you promise to mow my lawn.) The key to consideration is that the promise is given in return for the benefit or detriment.

The defenders of this doctrine claimed that consideration had the virtue of a formal rule. As I noted earlier, formal rules may make obligations easy to identify. We are all better off if we can determine where we stand by fixed landmarks. Not only do formal rules make life easier for judges who have to enforce contracts, but it also makes it easier for people like Willie to know where they stand. Consideration, however, leaves much to be desired as a formal rule. It lacks the hard edges of, let us say, a contract under seal or a conveyance of real property by livery of seisin.

Nevertheless, the doctrine of consideration makes a lot of sense. It has a long lineage. An action in *assumpsit*, for example, had to state the “consideration” that supported the promise or undertaking. It would be an exaggeration to say that the doctrine of consideration had been as rigorously defined by the courts as Langdell claimed, but the doctrine does divide the world of promises that are legally enforceable from the world of promises that are not in a way that comports with our intuitions. My promise to sell you widgets is legally enforceable. My promise to meet you after this lecture for a drink is not. The first promise is part of a bargained-for exchange; the second one isn't.

Langdell's map of the domain of legally enforceable contracts was initially quite successful. For most cases, the doctrine of consideration seemed to make sense. At the start of this century, however, Arthur Corbin mounted a formidable attack on it. The focus on his attack was not on the doctrine of consideration *per se*, but rather on Langdell's approach to the entire enterprise.

The fatal flaw, in Corbin's view, lay in Langdell's assumption that the doctrine of consideration was a scientific principle, like the law of gravity. Langdell thought one could not examine the domain of legally enforceable promises without invoking the doctrine of consideration, just as one could not discuss the physics of a falling apple without invoking the law of gravity. Langdell never understood that there is a need to explain why a legal rule makes sense. We can change the doctrine of consideration if we think it would make the world a better place. We cannot change the gravitational constant of the universe, no matter how much it might improve things.

The best illustration of the blindness of Langdell's approach is the notorious Brooklyn Bridge hypothetical. I offer you \$10 if in return you walk across the Brooklyn Bridge. Now if you cross the bridge, I have to pay. The doctrine of consideration works fine here. The detriment you incurred by walking across the bridge supports my promise to pay you \$10. But what happens if I change my mind when you are half-way across the bridge? Can I revoke my promise and tell you to forget it? For someone like Langdell the answer was easy: You were

not bound to finish crossing the bridge once you start. Therefore I must be free to revoke my promise until you are completely across. Given the doctrine of consideration, obligations had to be mutual. If you were not obliged, there was no detriment to support my promise. If you can call off your performance, I can call off my offer.

For a long time, people could not see their way out of the notion that, as long as you were not bound, I could not be either. The idea that only one party was bound made no sense. It was like one clapping. You become trapped into these positions once you think that consideration is an elementary particle essential to all legally enforceable promises.

Corbin, however, cut the Gordian knot. Why, he asked, do we enforce a promise when it is made in return for another:

The answer lies in the prevailing notions of honor and well-being, notions that grow out of ages of experience in business affairs and in social intercourse. At all events, it is quite unnecessary to reply that a return promise is a sufficient consideration because it is a detriment. It is much better to answer: because the parties have expressed their mutual assent in conventional form.

Corbin, in short, recognized that the doctrine of consideration is just a convention, albeit a useful one. In his words, it is the “conventional form” in which parties can cloak their promises when they want to be legally bound.

Once Corbin rejected the notion that consideration was a law of nature, however, he needed to revisit the question of just what promises were legally enforceable. In one sense, Corbin’s project was profoundly conservative. Ever since the rediscovery of Roman law at the University of Bologna in 1088, legal academics had done just what Corbin was doing: discovering new and better ways of organizing and understanding the law.

Corbin was Aristotle to Langdell’s Plato. Corbin wanted to focus on the world as it was and draw conclusions about the structure of the law from “prevailing notions of honor and well-being, notions that grow out of ages of experience in business affairs and in social intercourse.” Corbin then was a revolutionary in a limited sense, for he did not think that legal principles existed in the abstract. But he did not advocate dramatic change and he still thought that the legal principles of a society were things that could be discovered. Legal principles could be derived from norms that command broad acceptance.

We can understand Corbin’s approach to the question of what promises should be legally enforceable and we can appreciate the limits of Langdell’s approach by returning to *Hamer v. Sidway*. The court that decided *Hamer v. Sidway* embraced Langdell’s principle that the touchstone of enforceability was consideration. The court in *Hamer v. Sidway* held that the uncle’s promise was

supported by consideration and was therefore enforceable. What was the consideration on the part of Willie, you ask? The uncle's promise was supported by the detriment Willie incurred when he refrained from smoking, swearing, drinking or gambling for 6 long years.

The court in *Hamer v. Sidway*, however, stretched the notion of bargained-for consideration too far. The uncle's promise is much better described as a promise subject to a condition. The uncle promised to give Willie money, but only if Willie lived a clean life. As I have already noted, a promise subject to a condition is not supported by consideration. It would therefore seem then that Willie should have lost. We don't have a bargained-for exchange.

What are we to make of this case then? Langdell's organizational scheme, of course, is intact if you are willing to say that this case was wrongly decided, but Corbin was convinced cases like *Hamer v. Sidway* were in fact correctly decided. Why? All the evidence suggests that the uncle meant the promise seriously. The promise was not made off-handedly or while the uncle was half-drunk. Willie was named after the uncle and the uncle wanted to do right by him. The uncle had planned to give Willie the money for a long time and the conditions about smoking and drinking were part of the uncle's efforts to put him on the right course. As one witness recounted at trial, the uncle

thought this five thousand dollars would be something for [Willie] to look forward to that would stimulate him to do right; and if he was steady and industrious this would be a good start, and if he was not, this would be enough for him to squander.

In short, the uncle made the promise seriously and he wanted Willie to rely on the promise. He wanted Willie to make plans—such as where and whether to go to school—with the knowledge that this money would come his way. No one would doubt that the uncle was morally bound to keep the promise.

In Corbin's view, the seriousness of the promise and Willie's reliance on it was decisive. Bear in mind that the reliance is not simply refraining from the pleasures of drink and tobacco, but also the way one plans one's life. I would be much more willing to go to college and incur substantial debt, for example, if I had a rich uncle who was going to give me a large sum in a few year's time. Making plans—deciding to go to college—is a good thing. I am better able to make plans if I know that my uncle's promise is legally enforceable and will be kept even if my uncle dies unexpectedly.

For Corbin, the idea that reasonable reliance on a promise should trigger legal liability not only made sense, but was derived from existing mores. The norm that a decent person keeps any serious promise that another relies upon is strongly held. Therefore, the reliance itself provides a ground for making the promise legally enforceable.

There is much to admire in Corbin's work, coming as it did just a few decades after Langdell's. We must credit Corbin with the insight that consideration is itself a convention that falls short of being an independent and immutable law that definitively establishes the domain of legally enforceable promises. Corbin's introduction of reliance as an organizing principle, however, is more celebrated and much more problematic.

Corbin claimed that promisees like Willie should prevail when they rely on a promise that is seriously made. Does this make sense? One has to judge Corbin by his own standards: Is making such promises legally enforceable consistent with, in his words, our "prevailing notions of honor and well-being, notions that grow out of ages of experience in business affairs and in social intercourse"?

The facts of *Hamer v. Sidway* were a little more complicated than I have so far allowed. When Willie turned 21, he did go to his uncle to ask for the money. The uncle, however, told Willie that he was not yet old enough to handle that amount of money, but that he would set aside the money for him until he was older. It appears that Willie accepted the uncle's proposal in good grace. Indeed, shortly afterwards, Willie went to his uncle to borrow \$2,500 so he and his father could start a new business, and the uncle made the loan. A year or so later, this business failed, and Willie filed a bankruptcy petition. Willie and his father tried again. This time the uncle gave them \$11,000 worth of goods in return for some promissory notes and a general release. This business also failed.

Willie, in short, was a 2-time loser by the time he was 30. We do not know his subsequent relations with his uncle. The uncle died when Willie was 33. Four days after the uncle died, Willie assigned his right to the \$5,000 to a third party. This third party then tried to enforce it against the uncle's executor. For those of you who might have been wondering, this is why the case is called *Hamer v. Sidway*, not *Story v. Story*.

What does all this tell us? These facts, I think, suggest why it may not make sense to make every serious promise legally enforceable. All promises contain many conditions implicit and explicit. Understanding what a promise means as circumstances change is a complicated business. Moreover, making a promise legally enforceable brings costs along with it. Litigation is expensive and prone to error. One should not blindly accept the syllogism that, because keeping promises is good, making them legally enforceable is even better. It is one thing to say that I am morally bound to keep any promise I make seriously and quite another to say that, when I make such a promise, I must expose myself to a swearing contest with my nephew's fraternity brothers in front of a Cook County judge.

Return to *Hamer v. Sidway*. Did the uncle discharge his promise by setting up Willie in business multiple times? If the uncle discharged his obligation in his

own eyes and in those of other members of the family, why should a judge be able to second-guess things? The social sanctions that exist may do a lot to keep the uncle in line. Moreover, judges are not well-equipped to delve into these situations.

Legal enforceability might seem a good idea in those cases in which the promisor is dead. Most promisors keep their promises. Making this kind of promise enforceable may be needed to allow the executor to do what the promisor would want done. But we have to be careful. We have a legal regime—the law of decedents trusts and estates—that is premised on the notion that gifts that take place after death have to be made manifest with an appropriate level of formality. If the promise is substantial enough to be litigated, why should it not have to be formalized in the same way as other gifts if it is to survive the death of the donor?

Another classic case, *De Cicco v. Schweitzer*, again forces us to ask how we should approach the question of legal enforceability. Cardozo confronted a father who promised to give his daughter and the count to whom she was engaged \$2500 a year after they married. Cardozo found the father's promise supported by consideration. Where was the consideration you ask? What the detriment did the daughter and the count incur in exchange for the promise? Cardozo pointed out that, even though the engaged couple were not legally bound to go through with the marriage at the time of the promise, they did anyway. It did not trouble Cardozo that the person suing the father was not the daughter nor even the count, but rather someone to whom they had assigned the promise some time before, no doubt at some discount. We suspect Cardozo found consideration because he thought that enforcing a promise here was a good idea.

Perhaps it is a good idea. One may need to give minor European royalty a legally enforceable quid pro quo in such situations. Henry James suggests as much. But the idea is not so obvious that it needs no defending. To be sure, one should not be hamstrung by the doctrine of consideration, but this only begins the inquiry. If we are doing more than using unguided intuition, what exactly is it that we are doing? We cannot just say that making such promises legally enforceable is a good idea. We must explain *why* making them legally enforceable is a good idea, given:

- (1) the extralegal pressures that are at work;
- (2) the limited competence of courts; and
- (3) the costs that come with making a promise legally enforceable.

Corbin thought reliance provided the explanation. Reliance was something immanent in the world. It was not a construct, like the doctrine of consideration, that we impose on the world. We must ask, however, whether this is in fact true. Let's look again at a familiar case.

Recall the facts of *Drennan v. Star Paving*. A general contractor asks for bids from subcontractors. The general contractor then uses these bids in preparing its own bid. After it is too late for the general contractor to change its bid, the subcontractor learns that it has made a mistake. Can the subcontractor withdraw its bid after it has been relied upon? Justice Traynor held that the subcontractor was bound:

[The subcontractor] had reason not only to expect [the general contractor] to *rely* on its bid but to want him to. Clearly [the subcontractor] had a stake in [the general contractor's] *reliance* on its bid. Given this interest and the fact that [the general contractor] is bound by his own bid, it is only fair that [the general contractor] should have at least an opportunity to accept [the subcontractor's] bid after the general contract has been awarded to him.

Justice Traynor, in other words, finds that the subcontractor should be bound because of the reliance on the part of the general contractor.

The outcome in this case may well be correct. But should we make reliance our exclusive focus?

Consider a slightly different case. A general contractor wants to know how much a project will cost. It hires an expert to estimate the cost of construction. The expert comes back with an estimate. The general contractor relies on the estimate in making its bid. The contractor wins the contract, but the costs are much higher than the expert predicted and the contractor loses money. Can the general contractor turn around and sue the expert? Our intuition tells us that the expert is not liable, at least if he was not negligent. There is a difference between buying an expert opinion and getting someone to guarantee that a project will come it at a particular cost.

But Traynor's logic applies to this case as much as it did to the case of the subcontractor. There are, of course, differences between the subcontractor and the expert, but do these differences have anything to do with *reliance*? The idea that when people rely on you to their detriment, you should have some obligation to make them whole seems to make a certain amount of sense, but we could say the same about the doctrine of consideration. To get the principle of reliance to work in the hard cases, you have to distinguish the case of the subcontractor from the case of the expert. You might do this by the notion of "reasonable" reliance. Relying on the subcontractor is "reasonable" in a way that relying on the expert is not.

But why is reliance "reasonable" in one case, but not the other? Let us assume that you can answer this question. You are not any longer looking at the world to determine whether some ascertainable fact exists. You are constructing a principle. In the end, it may be every bit as abstract as the doctrine of

consideration. Indeed, it may even prove circular. The enforceability of the promise may turn on whether reliance is reasonable and whether reliance is reasonable may turn on whether the promise is enforceable. Principles are, of course, not bad per se, but they require justification.

Let me make this point another way by turning to another well-known case. In the *Allegheny College* case, a widow had promised to leave a bequest to a college. Cardozo once again found that there was consideration. Cardozo could find consideration anywhere:

The promisor wished to have a memorial to perpetuate her name. . . . [T]here was an assumption of a duty [on the part of the college] to do whatever acts were customary or reasonably necessary to maintain the memorial fairly and justly . . .

Cardozo goes on at length to explain how this gift was part of a bargained-for exchange. Corbin wished that judges did not have to make such heroic stretches of the doctrine of consideration. Corbin thought judges should be able to look at the reality of these situations. The presence of reliance would tell us that this promise was one we should enforce. But does the idea of reliance do the slightest bit of good here? How exactly did the college rely in this case? Was it reasonable? Moreover, Corbin thought that these promises to charities should be enforceable as a general matter. How do we get this out of the idea of reliance? If we do, isn't the doctrine of reliance well on its way to becoming as artificial and constructed as the doctrine of consideration? The Second Restatement virtually concedes this point by declaring that, in the case of charitable subscriptions, reliance is presumed.

We should be careful. There is nothing inherently the matter with having simple abstract principles that set out the domain of legally enforceable promises. But the principle of reliance has led us astray precisely because people have failed to recognize that it is only an abstract principle, not a feature that we naturally find in the world around us. Just as Langdell was wrong in thinking that the doctrine of consideration was a universal law of nature, many have mistakenly thought that reliance was something other than a general principle that we have constructed ourselves.

Let's see the danger that this way of thinking creates for us by looking again at a familiar case—*Goodman v. Dicker*. It is just after World War II. Dicker wants to go into the business of selling radios. Radios after all are the medium of the future. They are great. There are even ventriloquists on the radio. Dicker goes to Goodman. Goodman is in the business of finding potential franchisees for Emerson Radio.

Goodman tells Dicker that he is sure to be given an Emerson franchise. Goodman tells Dicker to hire agents, to start lining up customers and to be ready

for the delivery of radios. Goodman's enthusiasm is understandable. He will get a cut on every radio Dicker sells. Goodman's optimism, however, turns out to be excessive and misleading. Dicker does not get the franchise and the money he spent preparing to sell the radios is wasted. Should Dicker be able to recover from Goodman? Let's think about this case as good common law lawyers. What cause of action should we be thinking about?

The nub of the case is misrepresentation. But the misrepresentation in *Goodman v. Dicker* does not give rise to liability under ordinary tort notions. There were no outright lies. In addition, Goodman would gain only indirectly by the efforts of Dicker. Traditional tort law usually requires deliberate fraud in these cases when the harm is only economic, rather than physical injury, and we don't have deliberate fraud here. Under usual tort principles, Dicker loses.

Now the principle of reliance is sufficiently broad and sufficiently vague that we might be able to squeeze Dicker inside of it, but why? Why should we avoid the hard question of whether we should reform the tort of misrepresentation? How does it help to dress this inquiry in the language of reliance?

Once we recognize that reliance is a constructed idea, the mere presence of reliance somewhere should not lead to the conclusion that there should be legal liability. Reliance, to be sure, tugs at our heart strings in a way that the presence or absence of consideration does not, but we can hardly organize the law of civil obligations by asking whether a plaintiff's case is one that we find sympathetic.

In short, the point I have made about inferred intent and consideration is one that we can make about reliance. Our ultimate ambition is to create legal rules that make the world a better place. These principles may be useful ways to organize the law, but we cannot expect to solve hard cases merely by pointing to them. It will not do to look to the uncle's inferred intent to determine legally enforceability. For the same reason, we cannot conclude that the uncle should be liable merely because the promise was supported by consideration. Nor can we say that the uncle should be bound merely because the promise was relied upon. In all these cases, the existence of the appropriate intent, consideration, or reliance turns on how we choose to define these concepts. The hard inquiry cannot be avoided.

In the end, I do not think that Willie should have been able to call upon the power of the state to enforce the uncle's promise. I would tend to draw the domain of legally enforceable promises narrowly for all the reasons I have suggested. In cases such as Willie's, forces are at work that are likely to induce the uncle to keep his promise. Moreover, unpacking all the conditions in these promises is hard and courts are apt to do this job badly.

But this is a point on which reasonable people can differ and I do not want to dwell on the merits of a case that arose long ago under conditions that are quite

different from those we face today. My principal point concerns a more general lesson we can draw from cases like *Hamer v. Sidway*. The hard case gives us a sense of how we should look at the easier cases.

In the realm of contract law, the easier cases arise in the commercial context. What is the way we should approach these obligations?

This was the question that Karl Llewellyn confronted. Llewellyn was Corbin's student. Much of his work can be understood as an effort to create a commercial law consistent with Corbin's idea that laws should be built upon "notions that grow out of ages of experience in business affairs." With Soia Mentschikoff and others, he drafted the Uniform Commercial Code. It has worked so effectively and so well because Llewellyn ensured that the legal rules in the Uniform Commercial Code were consistent with the custom and practices of merchants.

Our examination of *Hamer v. Sidway*, however, suggests a way in which we should use this idea of looking at the custom and practices of merchants cautiously. It is a leap to derive our legal rules from customs and practices. By definition, parties turn to the courts only when something has gone wrong. Customs and practices tend to emerge in good times. They may not tell us what to do in bad times.

In addition, one has to be careful about drawing inferences from customs without knowing a lot about the circumstances under which they came into being. An historian in the distant future who knew nothing about the 1960s except a series of amendments to the rules of a country club might infer that people's dress became increasingly formal and fastidious during this period. This club introduced all sorts of rules now requiring members to wear ties and jackets. This historian, of course, would be making a mistake because he did not understand the context. Such rules were not required at the club until the late 1960s because before then everyone wore a tie and jacket. Rules had been unnecessary.

Commercial practices also arise in a particular context. The relevant commercial practice in any case is something we have to construct from fragmentary bits of evidence. It may give us less guidance than we think. The lesson of *Hamer v. Sidway* is a simple one here. We should not casually identify something as the relevant commercial practice. Doing this may give us too little focus to our intuitions.

Let me spend my last few minutes tying things together. There is nothing dramatically wrong with the substance of the first-year contracts course. To be sure, much of the course is concerned not with the day-to-day practice of commercial law, and, if I had my druthers, I would push the course more in this direction. But there are, at least at Chicago, courses that worry about the down-

to-earth problems. More important, contracts serves a valuable purpose when it traces the evolution of modern contract law. By looking at the contracts cases that have been litigated over the last century, you can get a feel for how the law has evolved and why common law reasoning takes the shape that it does.

We need formal doctrines to organize the law and make it predictable and consistent across cases, but we should not pretend that these doctrines have a totemic character. Many of the legal concepts that we have developed may work well, but there is a limit to the amount of freight we can ask them to bear. It is too easy to forget that the ultimate test for whether a promise should be legally enforceable should turn not on consideration or reasonable reliance, but rather on whether enforcing that promise will make the world a better place. Now I do not want to suggest that everything should be ad hoc. The principle of reliance, like the doctrine of consideration, may be a useful way to organize the law. But it can be useful only if we understand its limits.

Langdell and Corbin were on opposite sides of a great debate, a debate that Corbin won. We should remember, however, that Corbin was a great legal scholar because he did more than choose sides. Corbin set out to map the world of legally enforceable promises on his own without taking previous answers as given. For too long, the principle of reliance has served as a narcotic for contracts teachers. Too often it has provided teachers with the thrill of being revolutionaries even when all they are doing is challenging ideas that no one has defended seriously for almost a century.

Hamer v. Sidway is a hard case, not one we can solve merely by uttering the magic word “reliance.” How the legal system should intrude into family affairs is not an easy question to answer. But it is because *Hamer v. Sidway* is a hard case that it is worth studying. It gives us a chance to test the way we think about the law. But we cannot expect pat answers. The law of contracts is too rich and too subtle to be reduced to a single metric.

We must continue to reconstruct the law of contracts, remembering that the test of any new organizing idea is whether it is useful. Any new idea, however, will have the same inherent limits as the doctrine of consideration and the principle of reliance. It will be man-made, rather than God-given. The principles we fashion cannot be independent of time and place. As Aristotle reminded us, fires burn here as in Persia, but the laws are different.

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