The Law of Obligations: the Anglo-American Perspective

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The Anglo-American law of obligations was profoundly reshaped in the two centuries after 1800. In contrast to constitutional law, land law and even criminal law, whose substantive principles were laid out in general works such as Blackstone's *Commentaries*, there was very little systematic thinking about the law of obligations, which tended to be discussed in terms of the remedies for enforcing them. Beginning in the later eighteenth century, however, and reaching its apogee a century later, jurists began to look for underlying principles which could explain the different aspects of the law of obligations, contract, tort and unjust enrichment. The theoretical turn which began in the earlier period continued into the twentieth century, though jurists' confidence in their ability to uncover single comprehensive explanatory theories diminished.

The transformation in thinking about the law of obligations was driven by contextual changes, both in society at large and in the legal domain. In an era of rapid economic growth, the volume of litigation which reached the superior courts at Westminster began to increase rapidly, after an eighteenth century slump. The nature of the litigation changed, as well as its volume. The late eighteenth and early nineteenth centuries saw an expansion in the proportion of commercial cases which were litigated, with judges from Mansfield to Ellenborough playing key roles in shaping new rules of commercial law. The mid-century in turn saw an expansion in the number of cases involving consumers and share-purchasers. The courts also saw a rise in the number of cases arising from accidents in the public sphere, most notably on the roads, raising new questions of how to determine who should be liable for the resulting harm. Where, in the early modern era, the paradigm tort claim involved a party whose private space had been invaded by another, in the nineteenth century, attention was more often focused on harms caused by collisions in collective spaces. These developments took place in the context of a relatively weak state, which preferred to leave it to the courts to resolve disputes between those whose interests clashed and to develop rules to co-ordinate their activities. In an era during which policymakers were heavily influenced by the theories of classical *laissez-faire* economists, governments were expected to remove barriers to the mechanistic operation of neutral economic laws, rather than to intervene with active social or economic policies. Private law could be seen as the neutral mechanism in which individual rational economic actors could co-ordinate their activity. Just as economists could seek for rational principles underlying the science of political economy, so jurists looked for rational principles underlying the science of law.

By the start of the twentieth century, the political and ideological landscape had changed. The individualism which underlay the *laissez-faire* state was increasingly under attack, and the state began to intervene more to regulate matters which had hitherto been left to private law ordering. The state began to be much more interested in questions such as environmental protection, consumer protection and workmen's compensation. In England, the early twentieth century saw the birth of systems of social insurance which would culminate in 1948 in the introduction of a 'welfare state'. Welfarism and collectivism did not supplant private law, but it raised new questions about its role and function. The individualist models on which the later nineteenth century private law theories were based seemed much less apt for a society in which weak consumers were regarded as needing protection from corporate

vendors in ways commercial buyers did not, and in which most accidents were insured against. In these changing contexts, theorists began to rethink both the relationship between public law and private law remedies and also whether the individualistic theories underpinning nineteenth century conceptions of private law still held true.

Nineteenth-century developments within the legal domain also generated new forms of theoretical thinking. Firstly, the mid-nineteenth century saw a series of procedural reforms which led jurists to think in new ways about substantive law. Led by David Dudley Field's New York reform of civil procedure in 1848, half of American states had abolished the old forms of action by 1870. In England, a series of reforms between 1852 and 1875 had the same effect. Removing the framework provided by the technical forms through which lawyers had hitherto perceived the law forced them to look for other ways of organising the material. It was in these years, according to Frederick Pollock, that the 'really scientific treatment of principles' began.'[1] Allied to this reform was the movement towards the fusion of courts of law and equity, again beginning in New York (in 1846) and ending in London with the Judicature Acts of 1873-5. It was not only the existence of a multiplicity of forms of action which fragmented the law of obligations. Owing to the different procedures used in law and equity, many cases involving contractual disputes or claims to reverse unjust enrichments had hitherto been brought in Chancery, and were treated by jurists simply as an aspect of equity jurisprudence. With the union of judicatures, jurists were able to seek general principles drawing both on legal and equitable doctrines.

A second significant development within the legal domain was the renaissance of legal education both in England and America. English legal education had been in the doldrums since the later seventeenth century, but in the 1840s, reformers began to call for a more academic training for barristers. A modest series of reforms followed, with the Inns of Court setting appointing five readers in 1852, and introducing compulsory examinations in 1872. Efforts were also made at the ancient universities, particularly in the 1870s, to revive legal education. Oxford appointed a number of eminent jurists, including Frederick Pollock, W.R. Anson and A.V. Dicey, to its professoriate , and in 1885, the first English periodical devoted to law, *Law Quarterly Review,* was founded. The late nineteenth century saw a much more vigorous flourishing of the academic study of law in American universities, particularly after Christopher Columbus Langdell's appointment as Dean of the law school at Harvard in 1870. Langdell assembled a formidable collection of scholars at Harvard, including Oliver Wendell Holmes, James Barr Ames, William Keener, Samuel Williston and John Wigmore. In the classroom and in print, these scholars set out to explore the principles of the common law, and show the innate rationality and logic of private law cases.

While law faculties remained relatively weak in English universities, American legal education continued to thrive in the twentieth century. In a country in which common law rules were applied in a large number of different jurisdictions, academic lawyers were able to exert a stronger influence than was the case in the more centralised English judicature. This was all the more so after the establishment in 1923 of the American Law Institute, which assumed the task of putting the complex and disordered common law applied across these

[1] Frederick Pollock, *The Law of Torts: a treatise on the principles of obligation arising from civil wrongs in the common law* (London, 1887), viii.

jurisdictions into a principled form. In the 1920s and 1930s, this body undertook a series of 'Restatements' or core areas of private law, including Contract, Torts and Restitution, which were to prove highly influential. At the same time, the Langdellian 'formalist' model of legal scholarship - which saw law as an autonomous technical science, whose principles could be teased out by a process of induction from case law - came under attack, particularly from Realist scholars who were sceptical about the value of abstract doctrinal study, and who were much more interested in looking at the actual operation of law, and at the workings of law as a vehicle of policy. Under Realist influence, American legal scholarship became more focused on public law questions, and doctrinal private law scholarship fell into relative decline. By contrast, in England, where academic law began to flourish in the wake of university expansion in the 1960s, but where Realism was much less influential, private law scholarship began to thrive.

Although theoretical perceptions of the law of obligations were revolutionised in the period under review, it would be a serious exaggeration to suggest that it was only in this era that scholars discovered the existence of distinct topics such as contract and tort. Lawyers had long been familiar with the distinction between contract and tort, for the rules of pleading forbade parties to join 'contractual' and 'tortious' forms of action.[2] Nevertheless, the pace and timing of the theorisation of different parts of the law of obligations differed. Despite the existence of a variety of forms of action to remedy contractual breaches, English jurists already had an awareness of the conceptual unity of contract a century before the commencement of the period under review. By contrast, eighteenth century jurists did not see any conceptual unity in the law of torts: they rather saw that the common law provided a large variety of remedies for a disparate set of wrongs. As late as 1871, Holmes could say that tort was 'not the proper subject for a law book', since the harms rectified by the distinct actions of trespass, case and trover had little in common with each other.[3] In this field, it took the abolition of the forms of action to spur thinkers to seek for underlying principles. It took longer still for unjust enrichment to be theorised; and indeed, many jurists continued to argue into the twentieth century that the division of contract and tort mapped the entirety of the law of obligations. It was only when jurists began to look across the borders of common law and equity that a new field began to be mapped out. If in each of these three areas, private law theorists searched for principles which would explain the nature and reach of the doctrine at issue, no jurist at the end of the twentieth century could plausibly claim that to have found *the* principle of his field. Instead, a multiplicity of theories in each area vied to explain areas of law which were in constant flux.

Contract

John Joseph Powell's *Essay upon the Law of Contracts and Agreements*, published in 1790, is often taken to have been the first general treatise on its subject. For some scholars, it stands at the outset of an era in which the modern conception of contract was born, in which the freely negotiated executory contract replaced a notion that contractual obligations derived

[2] See M Lobban, 'Mapping the Common Law: Some Lessons from History', (2014) *New Zealand Law Review*, 32-6.

[3] Book review, (1871) 5 *American Law Review* (1871) 340 at 341.

from the fairness of an (executed) exchange.[4] Others locate it at the start of an era in which jurists began to rationalise contract law in terms of a will theory borrowed from continental civilian writers.[5] In fact, neither the concept of the executory contract nor will theory were new to common lawyers. In his unpublished treatise on contract dating from the first decade of the eighteenth century, Jeffrey Gilbert had spoken of contractual obligations as deriving from the acts of the will of the parties entering into an agreement,[6] while the author of the *Treatise of Equity*, published in 1737, also stressed that contracts required a 'Union of Minds' involving acts of deliberation.[7] The fact that English law had a variety of forms of action to deal with contractual claims, and the fact that there were distinct rules pertaining to formal contract by deed, and informal or verbal contracts, did not mean that they could not perceive them as aspects of a larger whole.

There were however very few systematic analyses of the law of contract before the end of the eighteenth century. Legal literature at the start of the century was still structured around different forms of action, such as *The law of actions on the case for torts and wrongs* (1720), or devoted to particular topics, such as *Baron and Feme* (1700). While there were no general works on contract law, there were treatises structured around the actions of covenant and debt *sur obligation*, both of which were used to recover on formal contracts.[8] By contrast, there was no treatise devoted to the action of *assumpsit*,[9] though this action (to recover on informal contracts) was much discussed in general abridgements. Formal contracts occupied much more scholarly attention than informal ones for a number of reasons. To begin with, such instruments were the vehicle for transactions involving land and family settlements, which were matters of prime concern to society where the main form of wealth was still in the land. Furthermore, since the middle ages, parties had also used penal bonds with conditional defeasance as a device to secure the performance of a much wider set of agreements. The sealed bond acknowledged a (penal) debt to the recipient, which would be voided by the performance of a condition stipulated in the agreement, but which would be due on failure to perform the condition. These contracts, which had been entered into with clear formalities, did not leave room for the court to discuss questions about when and how the contract had come into being. They did however offer plenty of opportunities for judges to discuss legal questions of interpretation and performance. This provided more material for textbook writers to discuss than did *assumpsit*, where it was largely a factual question for the jury as to whether the parties had made the agreement alleged.

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[4] Morton J Horwitz, *The Transformation of American Law, 1780-1860* (1977), 161.

[5] A W B Simpson, 'Innovation in Nineteenth Century Contract Law', in Simpson, *Legal Theory and Legal History: Essays on the Common Law* (1987), 178.

[6] See *Jeffrey Gilbert on Property and Contract*, ed. M Lobban (Selden Society vol. 134, 2017), forthcoming.

[7] [H. Ballow] *A Treatise of Equity* (1737), 6.

[8] *The Law of Obligations and Conditions* (1693), *The Law of Covenants* (1711).

[9] There was however some treatment in William Sheppard's *Actions upon the Case for Deeds* (1663), 17ff.

By the early nineteenth century, however, the informal contract, enforced by the action of *assumpsit*, had become the paradigm contract for legal writers. While legal authors continued to produce works on the formal contracts, they were now only a niche in the market: the leading books, such as Samuel Comyn's *A Treatise of the Law Relative to Contracts and Agreements not under seal* (1807) or Joseph Chitty's *A Practical Treatise on the Law of Contracts not under Seal* (1826) were devoted to discussing the matter covered by *assumpsit*. The shift to the centrality of *assumpsit* may be explained in part by doctrinal developments in the courts leading to the decline of the use of penal bonds. The court of Chancery had long given relief against penalties on bonds, if it could see what sum was really due, or if the party could be adequately compensated in damages. In 1697 and 1705, statutes were passed to give the common law courts similar powers. This severely reduced the utility of the penal bond to coerce performance. Applying these statutes, common law judges began to articulate rules to distinguish between penal sums which could not be recovered and 'liquidated damages', which were enforceable contractual stipulations. Furthermore, by the end of the century, it was settled that these rules applied not only to contracts which were embodied in formal bonds, but also to informal contracts, and that juries in *assumpsit* cases were not free to ignore the 'liquidated damages' clauses agreed by the parties. In this way, rules developed for the relief of parties using one form of contract migrated into the other form, just at the time that these rules rendered penal bonds much less attractive to use. The second half of the century also saw judges seeking to diminish the discretion of juries in awarding damages more broadly in *assumpsit* by allowing motions for a new trial where damages had been excessive.[10]

The late eighteenth century also saw an influx of new kinds of commercial litigation into the common law courts. In this context, judges who felt that the 'great object' of mercantile law was 'certainty'[11] sought settle rules in numerous areas of commercial law, such as insurance and the sale of goods, thereby in effect reducing the scope of the jury to determine them as matters of fact. While numerous commercial cases were sued in actions of covenant - for many commercial instruments, such as charterparties, were formal instruments - many more cases came to court under the action of *assumpsit.*[12] In such cases, the courts were not particularly interested in the form of action used, but in developing the underlying principles of law.

In seeking to put the rules of English contract law into a rational framework, textbook writers were able to draw inspiration and ideas from Robert-Joseph Pothier's *Traité des Obligations*, which was translated into English in 1806 by W D Evans.[13] This work, which was based on a

[10] See G T Washington, 'Damages in Contract at Common Law', (1931) 47 *LQR* 345 and (1932) 48 *LQR* 90.

[11] *Milles* v. *Fletcher* (1779) 1 Doug 231 at 232 (Lord Mansfield).

[12] Charterparties were formal contracts sued on in covenant. However, for leading cases on sale of goods or insurance sued in assumpsit, see e.g *Parkinson* v. *Lee* (1802) 2 East 314, *Bilbie* v. *Lumley* (1802) 2 East 469.

[13] W.D. Evans, *A Treatise on the Law of Obligations or Contracts, by M. Pothier* (1806).

will theory of contract, not only discussed the nature of contracts and their formation, but examined vitiating factors, interpretation and damages. Pothier's work has been credited with paving the way for a reception of civilian ideas into nineteenth century English contract law: once common lawyers began to think of contract in terms of the parties' wills, it is argued, the way was opened for the articulation of new doctrines such as offer and acceptance, mistake and frustration, and the quantification of damages, which could borrow civilian rules. Some authors were clearly heavily influenced by Pothier's exposition. One such was the Indian judge, Henry Colebrooke. His 1818 treatise, which began with the definition of contracts before turning to their validity, interpretation and effect and dissolution, drew relatively little on English case law, but referred extensively to both Pothier and other writers in the Roman law tradition, to give readers a comprehensive overview of the concept of contract.

However, Pothier's influence should not be exaggerated. Writers based in England, whose primary audience was one of practitioners, hardly needed his work to tell them that a contract was the product of an agreement by parties with contractual capacity.[14] Nor had they much interest in exploring theoretical doctrines which had yet to come before the courts. These writers drew on Pothier only to the extent that he helped elucidate the concepts they were interested in. For instance, Comyn drew on Pothier's rules for the interpretation of contracts, placing it at the outset of the second chapter of his second edition, on the construction of agreements. Chitty drew on Pothier's contrast between pollicitations and contracts (as well as his discussion of contracts by correspondence in the *Traité du contrat de vente*) when discussing recent cases on the assent of the parties to the agreement.[15] However, neither writer was interested in exploring other matters found in Pothier's work, such as duress or mistake, for these were not questions which had as yet arisen in the case law of the courts with which they were dealing. Nor is it insignificant that these writers drew more on Pothier when revising their works for a second edition, than in their initial attempts. For the most part, these writers saw their task as one of digesting the recent case law on topics such as the sale of goods or damages. Authors such as these also elaborated doctrine on topics such as the performance obligations of contracting parties, whose original rules had derived from formal contracts, but which had now migrated to informal ones.

It was this focus on the common law cases which accounts for the omission of detailed discussion of vitiating factors such as fraud or mistake, which were still largely the preserve of courts of equity. It was only when the common law courts began to be able to hear the evidence of parties and entertain equitable pleas that these doctrines found their way into the common law and into treatises. Thus the topic of mistake - a central concept in Pothier's will theory - did not gain treatise treatment until S M Leake devoted a section to it in 1867, the same year in which it got its first judicial recognition, in Blackburn J's articulation of the

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Evans included a volume of notes comparing the English law. An earlier translation of Pothier's treatise by F-X Martin appeared in North Carolina in 1802.

[14] See the English sources cited in Samuel Comyn *A Treatise of the Law Relative to Contracts and Agreements not under seal* (1807), 2-3.

[15] Joseph Chitty, *A Practical Treatise on the Law of Contracts not under Seal*, 2nd ed (1834), 8-12.

Roman law principle that 'where the parties are not at one as to the subject of the contract there is no agreement.'[16] Treatise writers, seeking a more principled elaboration of contract doctrine, were subsequently to play a large part in developing the law of contractual mistake, by reinterpreting older common law cases, and putting them into a theoretical framework borrowed from Pothier and F C von Savigny. The number of mistake cases which came to court was very small, and theoretically minded treatise writers who wished to present a coherent and complete vision of contract law, were able to give it a prominence in the texts which its position in the courts may not have merited.

Academic lawyers in the second half of the century, such as Frederick Pollock, were much more explicit in identifying an underlying will theory than their early nineteenth century predecessors had been. However, it was evident that not all English doctrine fitted the model comfortably. The most problematic doctrine for will theory was the requirement that informal contracts carried consideration. Some eighteenth century judges and jurists had seen consideration as simply providing evidence of a necessary contractual will, suggesting that it was not an essential part of contract doctrine.[17] However, this was hardly a position which could be taken by writers who made the informal contract the paradigm. The very same early nineteenth century writers who laid stress on the agreement of the parties also saw consideration as an essential component. Although this suggested that contracts had to involve some kind of exchange, jurists were quick to note that the law did not weigh its adequacy, since it would be unwise to interfere with the facility of contracting, and the free exercise of the judgment and will of the parties.'[18] Still, there had to be some kind of bargain in the eye of the law, however unequal. Case law continued to generate multiple examples of what constituted consideration, though little attention was devoted to the theory underpinning it.

By the mid-century, questions began to be raised whether seriously intended promises should be held binding notwithstanding the lack of consideration. Arguments were made that parties who had induced others to rely on their representations of their future intentions should be estopped from going back on them,[19] and that parties who had promised to accept smaller sums in discharge of larger debts should be held to their promises, without any additional consideration being provided. In an era when courts were increasingly able to probe the parties' actual intentions, and protect from fraud or undue influence, and when the technical requirement of consideration appeared to be commercially inconvenient, an opportunity was presented to reform the doctrine and align the common law with the demands of will theory. However, in *Foakes* v. *Beer*,[20] the House of Lords declined to take this step, but rather upheld the centrality of consideration.

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[16] *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co* (1867) LR 2 QB 580 at 587-8.

[17] See [Ballow], *Equity* (n 7 above) 37, *Pillans* v. *Van Mierop* (1765) 3 Burrow 1663 at 1665.

[18] Chitty, *Contracts* (1834) (n 15 above) 26.

[19] Such as that they would never enforce bonds given to them by the other party: *Money* v. *Jorden* (1852) 2 De G M & G 318, *Jorden* v. *Money* (1854) 5 HLC 185.

[20] *Foakes* v. *Beer* (1884) 9 App Cas 605.

In fact, by the time *Foakes* v. *Beer* was decided, will theory had already begun to lose its attractions for those jurists who did not seek to import continental theories, but who wished to tease the principles of contract law out of English case law. It was C C Langdell at Harvard who led the way in seeking theoretical explanation for consideration. In his view, consideration was the promisor's sole inducement to make the promise.[21] This theoretical focus on the consideration requirement took jurists away from will theory towards a bargain theory, which stressed 'the relation of reciprocal conventional inducement, each for the other, between consideration and promise.'[22] At the same time that jurists theorised a component largely absent from will theory, so they began to draw attention to its weakness in explaining other aspects of the common law, such as the fact that in deciding whether contractual obligations existed, the common law considered not the subjective will of the parties, but their objective conduct. Langdell was blunt: 'mental acts or acts of the will are not the materials out of which promises are made'.[23] This led some jurists, including Pollock, to modify their theoretical views, and to begin to speak of contracts in terms of expectations generated by the promisor's conduct on which the promisee could reasonably rely.[24] Although scholars in England and America continued to debate the foundations of particular doctrines (including consideration), they retreated from the pursuit of a single master-theory, which could be the key to all of contract law.

Consideration would remain a cornerstone of contract doctrine throughout the twentieth century, even though jurists struggled to find a theory which could explain it. Some, such as Anson, remained purists on the need for consideration. Others, such as Ames, interpreted the doctrine in a way broad enough to allow more or less any serious promise to be enforced.[25] Pollock's view on this, as on so much else, was variable. Langdell's work prompted him to insert a definition into the third edition of his textbook - of consideration as 'the price for which the promise of the other is bought'[26] - which hinted at the bargain theory, just as he was beginning to veer (under other influences) towards the reliance theory. Although struggling to find a theory which could adequately explain consideration, he defended the doctrine on practical grounds in the early twentieth century, before admitting a year before his death in 1937 that the doctrine could not be defended and should be consigned to history.[27]

The bargain theory of contract which consideration embodied was qualified in the mid-

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[21] C C Langdell, *A Summary of the Law of Contracts* (1880) 71.

[22] O. W. Holmes, *The Common Law* (1880), 230.

[23] Langdell, *Summary* (n 21 above), 244.

[24] Frederick Pollock, *Principles of Contract at law and in equity*, 3rd ed (1881), xx.

[25] J.B. Ames, 'Two Theories of Consideration - II. Bilateral Contracts' (1899) 13 *Harvard Law Review* 27.

[26] Pollock, *Contract*, 3rd ed (n 24 above) 179.

[27] Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (2004), 204.

twentieth century by the emergence of a doctrine - promissory estoppel - which laid more stress on reasonable reliance. This doctrine found its way into the law largely thanks to the work of Samuel Williston, Reporter for the Restatement of Contracts. Though a doctrinal 'formalist', Williston did not see the law as a closed logical system, but admitted that legal rules needed to conform to social needs. In his 1920 textbook, Williston identified several cases involving gratuitous promises in which the courts had 'frankly admitted that estoppel and not consideration was the ground on which recovery was allowed'.[28] He further suggested that it was arguable that 'the fundamental basis' of contractual obligations historically was rooted not in 'the purchase of a promise for a price' but in 'justifiable reliance on a promise'.[29] Although Williston hinted that reliance might take the place of consideration,[30] the doctrine of promissory estoppel which he drafted as section 90 of the Restatement was more cautious, leaving room on pragmatic grounds for a doctrine of consideration.[31] The presumptive rule was that contracts should be bargains, made with consideration; but that rule could be dislodged where a person could have reasonably expected a promisee to act his promise, and where 'injustice can be avoided only by enforcement of the promise'. Although Williston's own understanding of section 90 was not driven by a reliance theory (for he anticipated that expectation damages would be awarded for the breach of promise), later jurists, influenced by Lon Fuller and William Perdue's famous critique,[32] grounded the doctrine in a theory of reliance. This idea soon became mainstream in the academy, and was reflected in the revised version of section 90, drafted by Robert Braucher for the second Restatement of Contract.[33]

[28] S. Williston, *The Law of Contracts*, 4 vols. (1920), § 116 at 249.

[29] Williston, *Contracts* (n 28 above), § 139 at 307-8, 313.

[30] E. Allan Farnsworth, 'Contracts Scholarship in the Age of the Anthology', (1987) *Michigan Law Review* (1987) 1406 at 1458-60.

[31] See Mark L Movsesian, 'Rediscovering Williston', (2005) 62 *Washington and Lee Law Review*, 207, 238.

[32] Lon Fuller and William Perdue, 'The Reliance Interest in Contract Damages' (1936-7) 46 *Yale Law Journal* 52, 373.

[33] See Edward Yorio and Steve Thel, 'The Promissory Basis of Section 90', (1991-2) 101 *Yale Law Journal*, 111.

Although different jurists and different jurisdictions have viewed the scope and basis of promissory estoppel in different ways,[34] American courts accepted that it could be a cause of action to allow a claimant to recover.

Promissory estoppel took longer to take root in England. In 1937, the Law Revision Committee reported that in many respects, the doctrine of consideration was a 'mere technicality' which was 'irreconcilable either with business expediency or common sense'.[35] Although not calling for its abolition (given its embedded nature in English law), it recommended that all promises made in writing should be enforceable and that agreements to perform existing duties or to pay smaller sums for larger debts should not fail for want of consideration (which would override *Foakes* v. *Beer*). Although these recommendations were never implemented, promissory estoppel found its way into English law thanks to a number of judgments by Lord Denning.[36] The English doctrine was more limited than the American, since it only provided a defence to a party who had relied on a promise by another not to enforce his rights against that party. However, in 1990, the Court of Appeal modified the doctrine of consideration, by recognising that the performance of an existing duty could constitute consideration in cases where it was of 'practical benefit' to the promisee.[37] A bargain was complete if the subjective will of the promisee regarded it as beneficial.

By the late twentieth century, no single theory could claim either to explain the underlying order in contract law or to give a complete account for why contracts were held to bind. Different scholars continued to defend theories based on the obligatory force of the parties' wills or the defendant's promise[38] or theories which grounded the obligation in reliance.[39] In addition to these theories of the 'internal' logic of the law, numerous scholars, particularly in North America, looked at contract law more instrumentally. Some applied economic analysis to contract law, exploring how contract rules promoted economic efficiency, while others looked empirically at the operation of contract law in various different kinds of markets. If theory flourished, it was often at a remove from doctrinal scholarship: the writers of late twentieth century textbooks, unlike their late nineteenth century predecessors, tended to plunge into doctrine without seeking overall theoretical explanations. At the same time, the rise of consumer protection legislation, designed to protect those of unequal bargaining power in the marketplace, and to regulate consumer contracts, made it evident that the unified 'law of contract', so striven for by the generation of Pollock and Langdell, had fragmented into increasingly bifurcated commercial and consumer rules.

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[34] See Eric Mills Holmes, *Corbin on Contracts: Formation of Contracts*, revised ed, (1996), vol 3, § 8.11.

[35] Law Revision Committee, *Sixth Interim Report: Statute of Frauds and the Doctrine of Consideration* PP 1936-7 [Cmd 5449] XIII.81, 17.

[36] *Central London Property Trust Ltd* v. *High Trees House* [1947] KB 130, *Combe* v. *Combe* [1951] 2 KB 215, *D & C Builders* v. *Rees* [1965] 3 All ER 837.

[37] *Williams* v. *Roffey Bros and Nicholls (Contractors)* [1991] 1 QB 1.

[38] See Charles Fried, *Contract as Promise: A Theory of Contractual Obligations* (1981)

[39] P S Atiyah, *Promises, Morals and the Law* (1981).

Tort

If lawyers had long perceived contract law to have an underlying conceptual unity, nineteenth century tort law appeared much more fragmentary. It was, moreover, a system in flux, as modern economic developments accorded the concept of negligence a much more prominent role, when accidents resulting from reciprocally generated risks in the world began to replace the invasion of private spaces as the paradigm harm.[40] It was consequently not until the 1880s, after the forms of action had been abolished and law had been revived as a scholarly subject, that the first attempts were made to theorise torts. The pioneer was Oliver Wendell Holmes. His theory was not borrowed from continental models, but derived from an analysis of the development of English case law. Holmes put the notion of fault at the centre of his theory. As he saw it, a person should only be liable for the bad consequences of his acts if 'under the circumstances a prudent man would have foreseen the possibility of harm'.[41] For Holmes, strict liability was not a principle rooted in the common law: where it existed, it was the result of a particular policy choice. In his view, parties should be liable in tort for all intentional acts which did harm, unless inflicted while exercising a privilege; and they should be liable for harms caused by their negligence. The standard of care required was an objective one, set by the community, rather than the subjective one of the actor. Other American jurists developed Holmes's notion that fault lay at the heart of tort, seeing a trend in modern law away from strict liability and towards ethical standards.[42] Some even argued that strict liability torts should be put into a different category altogether.[43]

Holmes's theory was taken up in England by Frederick Pollock. Seeking a principle to explain the developing law of negligence, he declared that 'every one commits a wrong who harms another [...] by want of due care and caution in his acts or conduct.'[44] If this seemed very open-ended, he envisaged controlling the scope of potential liability through rules relating to causation and damages, whereby a defendant would only be liable for the foreseeable consequences of his actions. Pollock also sought to articulate a general moral principle which could underpin all of tort law: 'All members of a civilized commonwealth are under a general duty towards their neighbours to do them no hurt without lawful cause or

[40] See Cornish et al, *Oxford History*, vol. 12, 903ff.

[41] Holmes, *The Common Law* (n 22 above), 96.

[42] See, eg, John H Wigmore, 'Responsbility for Tortious Acts: its History' (1894) 7 *Harvard Law Review* 315, 383, 441, James Barr Ames, Law and Morals, (1908) 22 *Harvard Law Review* 97 at 99.

[43] J Smith, 'Tort and Absolute Liability - Suggested Changes in Classification,' (1917) 30 *Harvard LR* 241, 319, 409, N Isaacs, 'Quasi-Delict in Anglo-American Law' (1922) 31 *Yale LJ* 571.

[44] Draft Indian Tort Code, Clause 9 (Pollock, *Torts*, 13th ed (1929) 623-4). In his textbook on tort (1st ed (1887), 353), he stated a 'general rule' that 'every one is bound to exercise due care towards his neighbours in his acts and conduct'.

excuse'.[45] However, Pollock's attempt to find general principles underlying tort law in general and negligence in particular did not gain universal assent. Taking a more traditional view, Sir John Salmond argued that the law of torts consisted of 'a number of specific rules prohibiting certain kinds of harmful activity' derived from the cases brought under the old forms of action.[46] Salmond felt Pollock's general principle was inconsistent with a number of recent high profile House of Lords cases.[47] Nor was he convinced by Pollock's theory of negligence: for Salmond, negligence was 'carelessness in a matter in which carefulness is made obligatory by law',[48] where a particular duty was owed to the particular plaintiff.

The debate over whether there were unifying principles underlying tort law continued to rage into the 1930s. Pollock's quest was taken up by Percy Winfield, who reiterated the view that that all injuries done to another were torts, unless the law gave a justification.[49] In Winfield's view, the historical expansion of torts, through the action of the case, showed that there was no closed set of torts, as Salmond's theory seemed to suggest. However, his argument was challenged by those (including a later editor of Pollock's treatise)[50] who reiterated Salmond's point that the case law simply did not support the view that there was a general duty not to harm absent excuse. Instead, a range of established torts existed, which judges extended by analogy.[51] In the second edition of his textbook, Winfield had to concede that English law recognised a definite number of torts outside of which liability did not exist, while still maintaining that the trend of the decisions was towards the unified principle he had identified.[52] Furthermore, unlike Pollock (and even Salmond), Winfield did not consider fault to be an essential requirement of tort law: for such a definition could not account for strict liability torts.[53]

Although the quest to find a single principle to explain tort law *in toto* appeared increasingly untenable, Pollock quest for a single principle to explain negligence fared better. In 1926,

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[45] Pollock, *Law of Torts* (n 1 above), 1.

[46] J Salmond, *The Law of Torts,* 2nd ed, (1910), 8-9.

[47] *Bradford* v. *Pickles* [1895] AC 587, *Derry* v. *Peek* (1889) 14 App Cas 337 and *Mogul Steam Ship* v. *McGregor* [1892] AC 25.

[48] J Salmond, *Torts* 4th ed (1916), 21.

[49] Percy H Winfield, 'The Foundation of Liability in Tort' (1927) 27 *Columbia Law Review* 1; *A Text-Book of Torts* (1937) p 15.

[50] In P A Landon's view, tort law consisted of 'a mere enumeration of actionable injuries' and the tortious quality of an act could only be discerned 'by reference to the experience of our forefathers'. Pollock, *Torts* 13th ed (1929) (n 44 above), 46.

[51] A L Goodhart, 'The Foundation of Tortious Liability' (1938) 2 *MLR* 1 at 10.

[52] P H Winfield, *A Text-Book of Torts,* 2nd ed (1943), 21.

[53] P H Winfield, *The Province of the Law of Tort* (1931) 216, 242-4.

Winfield traced the emergence over time of an independent tort of negligence,[54] and six years later, in *Donoghue* v. *Stevenson*,[55] Lord Atkin endorsed the 'neighbour principle' which underpinned it. Although Atkin spoke of a 'duty of care', Winfield argued that the concept of duty was redundant, the chief ingredient of the tort being the negligent conduct causing damage.[56] In articulating this view, he was echoing Pollock. Although Pollock was careful to insist that absent a contract, there was no affirmative duty to prevent harm to others, he argued that once anyone embarked on any conduct 'attended with risk', they were bound to exercise care. Pollock did, from his second edition, add that proof of 'negligence in the air' would not do, but this was only to illustrate the point that the negligence had to be connected to the injury[57] - not (as Cardozo would later gloss it) that 'negligence is not actionable unless it involves the invasion of a legally protected interest'.[58] Nor did Winfield speak of the interests protected by law: in his view, in determining novel cases, judges had only to look to the guidance of Lord Atkin's *dictum* in *Donoghue* v. *Stevenson*. For Winfield, the 'control mechanisms' in negligence were want of 'sufficiency of evidence for the jury, contributory negligence, remoteness of damage, inevitable accident, *volenti non fit injuria*'.[59] Like Pollock's, Winfield's formulation sought a principle which could be elaborated as a matter of doctrine.

The concept of negligence as a distinct tort was also developed by numerous American jurists in the early twentieth century.[60] Tort law books began to be dominated by negligence and the apparatus of concepts which served to limit its scope (such as causation or assumption of risk).[61] However, American jurists soon began to focus more on external factors. To begin with, they explored how to put bounds on liability, given that almost anything might generate a foreseeable harm. In 1915, Henry T Terry argued that in determining what constituted negligent conduct, the utility of the defendant's conduct both to himself and to society had to

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[54] Percy H Winfield, 'The History of Negligence in the Law of Torts', (1926) 42 *LQR* 184 at 196.

[55] *Donoghue* v. *Stevenson* [1932] AC 562 at 580.

[56] Percy H Winfield, 'Duty in Tortious Negligence' (1934) 34 *Columbia Law Review* 41 at 64.

[57] Pollock, *Torts* 4th ed (1895) 390, 405.

[58] *Palsgraf* v. *Long Island Railroad Co* 248 N.Y. 339; 162 N.E. 99 (1928).

[59] Winfield, 'Duty in Tortious Negligence' (n 56 above), 64.

[60] See eg Francis H Bohlen, 'The Basis of Affirmative Obligations in the Law of Tort' in his *Studies in the Law of Torts* (1926) 33-155, at 61-3. Bohlen's views were endorsed and applied in *MacPherson* v. *Buick Motor Co MacPherson* v. *Buick Motor Co* 217 NY 382, 111 NE 1050 (NY 1916).

[61] See Francis H Bohlen, 'Fifty Years of Torts', (1937) 50 *Harvard Law Review* 1225 at 1228.

be weighed against the magnitude of the risk to which it subjected others.[62] This was to suggest that the law of negligence entailed a balancing interests rather than simply applying a moral principle. Moreover, by the 1920s, the formalist vision which had underpinned the late nineteenth-century quest for principle came under attack from Realist critics, who were sceptical about attempts to tease universal concepts out of reported case law. Rather than seeing law as an abstract moral science, they saw it as a tool of social engineering which reflected particular policy choices. Leon Green was particularly sceptical about the Holmesian idea that there was a single duty, holding that duties could only be owed to particular people in particular circumstances. In his view, the determination of whether a duty existed was a matter of policy, to be decided by judges who would consider which party was best placed to bear the risk of the activity, taking into account the broader needs of the community. The determination of whether a breach of that duty had caused harm to the plaintiff was a matter of fact for the jury, and did not depend on technical notions of the nature of causation.[63] For the Realists, tort law was much more about compensation for accidental harms than about deterring faulty behaviour.

Despite these attacks, a largely formalist vision was embodied in Restatement of Torts. Its reporter, Francis Bohlen, was not a Realist, and he devoted much attention to technical questions (such as causation) for which Green had little patience. Nonetheless, Bohlen also recognised the social anchoring of tort law. As he put it, it was inevitable that 'changes in the relative importance attached by public opinion to the interests concerned, should have a controlling effect upon the judicial decisions which create the law of Torts'.[64] He saw negligence law in terms of the interests it protected.[65] Bohlen was not (like Pollock) devoted to searching for a single unitary theory for torts: indeed, he never wrote a torts treatise to match Williston on contract. He also played a leading role in drafting Pennsylvania's Workmen's Compensation legislation, and developed a theory to cover cases where those who created extra-hazardous risks could be held strictly liable.[66] His Restatement consequently included a provision on ultrahazardous activity (§ 520) which had the potential to expand 'strict liability on progressive enterprise liability principles'.[67]
In the United States, the notion that tort law was about compensation rather than deterrence gained ascendancy in the mid-twentieth century. In 1959, Leon Green proclaimed that tort law was 'public law in disguise', pointing to the wider public interest in the outcome of any

[62] Henry T Terry, 'Negligence', (1915) 29 *Harvard Law Review* 40.

[63] Leon Green, 'The Duty Problem in Negligence Cases' (1928) 28 *Columbia Law Review* 1014 and (1929) 29 *Columbia Law Review* 255.

[64] Bohlen, 'Fifty Years of Torts' (n 61 above) 725-6.

[65] The idea that the law of negligence existed to remedy careless invasions of legally protected interests was clearly stated in the Restatement of Torts (§ 281).

[66] Francis H Bohlen, 'The Rule in *Rylands v Fletcher'* (1911) 59 *University of Pennsylvania Law Review* 298.

[67] Patrick J Kelley, 'The First Restatement of Torts: Reform by Descriptive Theory' (2007) 32 *Southern Illinois University Law Journal* 93 at 119.

tort case.[68] In this context, doctrinal scholars began to be sceptical about the centrality of fault and to expand doctrines which could protect consumers better. Whereas earlier jurists had sought to marginalise strict liabilities, later doctrinalists such as William Prosser argued that they could serve a useful policy function, such as shifting the burden of accidents caused by defective products onto producers who were best able to distribute the risk to the general public by means of prices and insurance'.[69] In a number of influential articles in the 1960s, he argued for a recognition of strict liability to consumers for defective products,[70] which began to be adopted in the case law.[71]

In England, where university legal education remained weak, Realism failed to take root. Instead, debates remained solidly doctrinal. There was particular discussion about the scope of the tort of negligence after *Donoghue* v. *Stevenson.* Jurists in the mid-century accepted Lord MacMillan's point that the 'categories of negligence are never closed',[72] though they disagreed over whether the law should only be developed through analogies to previous categories or whether it could be expanded on the basis of Atkin's broad principle. Although an increasing number of judges were 'treating Lord Atkin's "New Testament" doctrine as being of binding authority,'[73] many jurists noted that the neighbour principle was not a 'general formula which will explain all conceivable cases of negligence'.[74] It raised certain problems. Firstly, it begged the question of what constituted harms, or in other words which interests were protected by the law: for it was clear that some interests - such as purely economic ones - were not protected by the law of negligence. Secondly, where the interest was a protected one, a line had to be drawn between cases which were actionable and cases which were not. By treating this as essentially a question of whether the duty of care had been breached - and whether there was evidence to put to a jury - jurists like Winfield regarded it essentially as a factual question, of proximity or reasonable foreseeability. However, other jurists - and the courts themselves - preferred to see it as a question of law, with the judge deciding whether the relationship between claimant and defendant was one which generated a duty to take care.[75] There had to be, in RWM Dias's words, 'recognised types of harm

[68] Leon Green, 'Tort Law Public Law in Disguise' (1959) 38 *Texas Law Review* 1 at 2.

[69] William L Prosser, *Handbook of the Law of Torts* (1941) s. 83 at 689. Prosser's theory influenced Judge Roger Traynor's approach in *Escola* v. *Coca Cola Bottling Co. Of Fresno* (1944) 150 P 2d 436.

[70] William L Prosser, 'The Assault upon the Citadel (Strict Liability to the Consumer)' 69 *Yale Law Journal* (1960) 1099, and 'The Fall of the Citadel (Strict Liability to the Consumer)', 50 *Minnesota Law Review* 791 (1966).

[71] Eg *Greenman* v. *Yuba Power Products Inc* 377 P 2d 297 (1963).

[72] *Donoghue* v. *Stevenson* [1932] AC 562 at 619.

[73] P A Landon, *Pollock's Law of Torts,* 15th ed (1951), 329.

[74] R F V Heuston, 'Donoghue v Stevenson in retrospect', (1957) 20 *MLR* 1 at 23.

[75] See *Grant* v. *Australian Knitting Mills Ltd* [1936] AC 85 at 103 (per Lord Wright) and *East Suffolk Rivers Catchment Board* v. *Kent* [1941] AC 74 at 89 (per Lord Atkin).

[inflicted] in recognised ways on recognised categories of persons'.[76] However, this meant that it could not be seen as a moral principle which could be straightforwardly applied to new cases. Rather, the law had to be developed by judges making choices as to which interests should be accorded legal protection.[77] If courts continued to disguise policy choices by using the language of whether the harm was reasonably foreseeable, jurists recognised that in many cases '"duty of care" is a formula expressed in terms of results rather than reasons.'[78] By the 1960s and 70s, judges and jurists were more frank in expressing the policy foundations of the duty of care.[79]

Even absent the intellectual challenge of Realism, a tort law based on ideas of individual moral fault looked increasingly out of kilter in a world of social and private insurance which spread the cost of harms more broadly losses. If the vision of tort of men like Holmes and Pollock had been that of a system designed to deter people from careless conduct, mid-twentieth century lawyers and litigants saw it more as a system to provide compensation for harms.[80] English judges in the second half of the century became increasingly willing to extend the boundaries of negligence, making it available (for instance) in 1963 for economic losses caused by negligent misstatements.[81] In 1970, Lord Reid held that negligence had come to be 'regarded as depending on principle, so that, when a new point emerges, one should not ask whether it is covered by authority but whether recognised principles apply to it.'[82] In 1978, the principle was reformulated by Lord Wilberforce in *Anns* v. *Merton London Borough Council* as involving as two stage test: first, the court had to look at whether the relationship of the parties was sufficiently proximate for a prima facie duty of care to arise; and secondly, if it did, the court should consider whether there were any considerations to should limit the scope of the duty or damages.[83]

The expansion of negligence in England in the generation after the foundation of the welfare state was subsequently associated in the minds of some judges with an 'assumption that anyone who suffers a loss is *prima facie* entitled to compensation from a person (preferably

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[76] R W M Dias, 'The Duty Problem in Negligence, [1955] *CLJ* 198 at 204.

[77] G Williams, 'The Foundation of Tortious Liability' (1939) 7 *Cambridge Law Journal* 7 (1939),111 at 114. Cf. Warren A Seavey, 'Chandler v. Crane, Christmas & Co: Negligent Misrepresentation by Accountants' (1951) 67 *LQR* 466 at 469.

[78] Heuston, 'Donoghue v Stevenson in retrospect,' (n 74 above), 17.

[79] See *Dorset Yacht Co* v. *Home Office* [1969] 2 QB 412 at 426 (per Lord Denning); cf P S Atiyah, *Accidents, Compensation and the Law,* 2nd ed, (1975), 66.

[80] Thus, where insured drivers caused harm, their insurers were held liable regardless of the moral blameworthiness of the notional defendant: *Nettleship v Weston* [1971] 2 QB 691.

[81] *Hedley Byrne & Co Ltd* v. *Heller & Partners Ltd* [1964] AC 465.

[82] *Dorset Yacht Co* v. *Home Office* [1970] AC 1004 at 1026-7.

[83] *Anns* v. *Merton London Borough Council* [1978] AC 728, 751.

insured or a public authority) whose act or omission can be said to have caused it.'[84] In fact, courts allowing actions of negligence in the 1970s against governmental bodies were often more motivated by a desire to ensure those authorities did their jobs - in effect using private law for public law purposes.[85] However, the potential ambit of negligence generated by the decision in *Anns* alarmed many and by the 1990s, the House of Lords was keen to reconsider the case. The decision was now characterised not as a statement of any established principle but 'a remarkable example of judicial legislation'.[86] Wilberforce's two stage test was reformulated as a three stage test in deciding whether a duty of care exists, involving foreseeability of harm, proximity between the parties and it must be 'fair, just and reasonable' to impose a duty.[87] Instead of seeking a general duty of care, courts turned once again to developing the law by analogy with existing duties, and considering the policy implications on other areas of law of extending duties of care.

The 1960s and 1970s also saw a new flourishing of tort theory, particularly in North America. A number of theorists began to look at tort law through economic lenses.[88] Instead of seeing tort law as a system of compensation, a number of theorists looked at how tort law could most efficiently prevent, or spread the costs, of accidents. Who was to pay for the social cost of accidents? Those who took an economic approach looked to place liability on the best cost avoider. Theorists such as Guido Calabresi argued that to promote the efficient allocation of resources, enterprises should be held liable for the true cost of producing their goods, which could be factored into their price. This suggested a theory of strict liability. By contrast, others, such as Richard Posner, argued that the negligence standard[89] generated the most efficient rules of liability.[90] According to his view, liability should be imposed on an enterprise if the benefit of accident avoidance exceeded the costs of prevention. Such a standard would induce parties to invest in accident prevention up to the point when it was cheaper to be sued. According to this view, which acknowledged the central role of insurance in modern economic life, tort liabilities had nothing to do with moral fault, but with promoting an economically efficient distribution of resources. Economic analyses were instrumentalist, seeing tort cases as presenting opportunities for judges to create incentives for economic agents to maximise their efficiency.

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[84] *Stovin* v. *Wise* [1996] AC 923, 949.

[85] See eg Lord Denning's reasons in *Dorset Yacht Co* v. *Home Office* [1969] 2 QB 412 at 456-7 and Lord Wilberforce in *Anns* v. *Merton London Borough Council* [1978] AC 728 at 754.

[86] *Murphy* v. *Brentwood District Council* [1991] AC 398 at 471.

[87] *Caparo Industries plc* v. *Dickman* [1990] 2 AC 605.

[88] Ronald Coase, 'The Problem of Social Cost', (1960) 3 *Journal of Law and Economics* 1, Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70 *Yale Law Journal* 499.

[89] Notably as articulated in Learned Hand's 'formula' in *United States* v. *Carroll Towing Co Inc* 159 F 2d 169 at 173 (1947).

[90] Richard A Posner, 'A Theory of Negligence', (1972) 1 *Journal of Legal Studies* 29 at 33.

A rival theoretical approach developed in the 1970s which focused more on tort law as a vehicle of corrective justice. Corrective justice theorists were highly critical of the instrumentalism of the economic analysis, arguing that it failed to see that litigants in tort cases did not come to court to offer the judge a chance to create policy for the community, but to vindicate a particular right. Corrective justice theorists argued that what economic analysis saw as the function of tort law was in fact the function of legislation, which was much better placed to identify and regulate the best cost-avoider. For corrective justice theorists, many of whom drew on Aristotle's concept, the key question was the how the court corrected the harm which had been done by one party to the other. A number of theories were put forward. In 1972, George Fletcher argued for a theory of liability for non-reciprocal risks: that every person has a right to security from risks beyond the general risks of background harms.[91] In the following year, Richard Epstein put forward a theory of strict liability, based on the idea that person should prima facie be liable for all harms caused by his actions.[92] In contrast to Fletcher's theory of risk-generation (which also entailed the question whether the defendant's action was reasonable), Epstein seemed to suggest that there existed a sphere of inviolable rights. Other corrective justice theories followed, notable Ernest Weinrib's *The Idea of Private Law* (1995), which rejected all functionalist views of law which sought to understand it in terms of its political or social functions. Tort law, he argued, was neither about compensation nor deterrence: rather, it entailed restoring two free and independent parties back to an initial situation which was disturbed by a non-consensual transaction.

Unjust enrichment

The law of unjust enrichment was much slower to be theorised than the others. Whereas the distinction between tort and contract was well rooted in English pleading rules from the early modern era, the categories set by the forms of action left little space for a distinct discussion of unjust enrichment, though it was clear to practitioners that both the common law and the Chancery offered remedies to reverse unjust enrichments. Litigants seeking to reverse unjust enrichments at common law could use either tortious or contractual forms of action: trover for property related claims, or an assumpsit for money had and received for money related claims. While English jurists in the eighteenth and nineteenth centuries referred to these claims as 'quasi-contractual,' Lord Mansfield's classic statement of the ambit of the action for money had and received - that it was an 'equitable action, to recover back money, which ought not in justice to be kept'[93] - suggested that he did not perceive the obligation to derive from the contractual consent of the parties. What made it *quasi* contractual was that the law implied a promise to repay the money which the defendant had no right to retain.

In an era dominated by the forms of action and where law and equity were separated, jurists struggled to find a clear definition of the subject. Mansfield's comment that it was an

[91] George Fletcher, 'Fairness and Utility in Tort Theory', (1972) 85 *Harvard Law Review* 537.

[92] Richard Epstein, 'A Theory of Strict Liability' (1973) 2 *Journal of Legal Studies* 151.

[93] *Moses* v. *Macferlan* (1760) 2 Burr. 1005 at 1012.

equitable action - and the very title of the action of money had and received to 'the plaintiff's use' - suggested that the courts might view the defendant as in some way a trustee of the plaintiff's property. However, those who did attempt to define it often did so in a negative way - speaking of what it was *not* - rather than explaining what it was. For instance, Nathaniel Lindley said that 'a *quasi* contract is an event giving rise to an obligation, and is characterized negatively, first by not possessing the essentials of a contract, and, second, by not being unpermitted, and so falling within the class of *maleficia*.'[94] In an era where the rules of common law pleading distinguished sharply between contractual claims and tortious ones, and in which the Chancery remained a wholly distinct jurisdiction, it remained difficult to articulate principles in this area.

The first scholars to think theoretically about unjust enrichment were James Barr Ames and William Keener. Discussing the history of *assumpsits* implied in law, Ames wrote that quasi-contracts were founded 'upon the fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another'.[95] This principle, he added, had established itself very gradually, growing initially from the action of account. Elsewhere, Ames spoke of the principle that 'a court of equity will compel the surrender of an advantage by a defendant whenever [...] upon grounds of obvious justice, it is unconscientious for him to retain it at another's expense'. This principle lay 'at the foundation of constructive trusts and other equitable obligations created by operation of law (including implied or quasi contracts, which are really equitable liabilities, upon which the common law assumes to give a remedy)'.[96] In the first treatise on the topic, Keener argued that the habitual classification of quasi-contracts as a kind of contract was both unscientific and 'destructive of clear thinking'. In quasi-contract, he noted, the obligation did not derive in any sense from the wills of the parties, but from the law. Keener followed Ames in articulating the principle that no one should be allowed to enrich himself at another's expense. It rested on 'what in equity and good conscience the defendant ought to do'.[97] Keener saw this principle as bringing together a range of cases, including money paid by mistake, waiver of tort and cases where parties were held to pay for benefits conferred where contracts had failed. Keener's treatise - derived from his teaching at Harvard - was confined to unjust enrichment at common law and omitted the equitable topics. Nonetheless, in the early twentieth century, a number of other scholars began to speak of the constructive trust as 'an equitable quasi-contract',[98] whose function was to respond to an unjust enrichment.

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[94] N[athaniel] L[indley], 'On the Theory of Implied Contracts' (1856) 24 *Law Magazine* ns, pp. 27, 33-34, 37.

[95] James Barr Ames, 'The History of Assumpsit. II - Implied Assumpsit', (1888) 2 *Harvard Law Review* 53 at 64.

[96] James Barr Ames, 'Purchase for Value without Notice', (1887) 1 *Harvard Law Review* 1 at 3, quoted in Andrew Kull, 'James Barr Ames and the Early Modern History of Unjust Enrichment' (2005) 25 *Oxford Journal of Legal Studies* 297 at 304.

[97] William A Keener, *A Treatise on the Law of Quasi-Contracts* (1893) 3, 14, 20.

[98] See eg George P Costigan Jr, 'The Classification of Trusts as Express, Resulting and Constructive' (1913-14) 27 *Harvard Law Review* 437 at 450n.

Early twentieth century American scholars thus began to see the similarity between constructive trusts and the common law 'quasi-contractual' remedies, and saw them as restitutionary vehicles based on a principle of reversing unjust enrichments.[99] However, neither Ames nor Keener had given the topic systematic treatment. Its recognition as a distinct subject owed much to the 1937 Restatement of Restitution. The American Law Institute had initially proposed treating constructive trusts in the Restatement of Trusts, with a separate Restatement of Quasi-Contracts. However, by 1933, a decision was taken to convene a committee to restate the subjects of 'restitution and unjust enrichment', in which these two topics would be combined, with Warren A Seavey and Austin W Scott as Reporters. By bringing together these two topics into a single category, the Restatement was seen by many as laying the foundations of a new doctrine, which had been largely unrecognised hitherto. As the Reporters explained to English readers, the Restatement reflected a conviction that the topics covered were all subject to a unitary principle which had not hitherto been recognised, and in so doing recognised the 'tripartite division of the law into contracts, torts and restitution', each of which protected 'one of three fundamental interests'.[100]

English jurists were slower to embrace the notion theory sketched out by Ames and Keener; indeed in 1914 the House of Lords held that all claims for money had and received were personal contractual claims, which could only be brought where the parties had contractual capacity.[101] Writers on contract, such as Pollock and Anson, saw that there was something distinct about quasi-contractual claims, but devoted very little attention to them. It was not until 1931 that Percy Winfield sought to sketch the contours of the common law aspects of the topic in a way which treated it as clearly distinct from contract, resting 'on the ground of unjust benefit.'[102] This view was rejected by Landon, who continued to insist that the liability had to be contractual, since there was no kind of obligation recognised in common law bar contract and tort.[103] However, after the appearance of the Restatement, a number of English jurists and judges began to speak of a principle of unjust enrichment as underlying the case law,[104] and in 1941 the House of Lords abandoned the fiction of the implied contract as underlying these claims.[105]

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[99] See Kull, 'James Barr Ames' (n 96 above) 304-11.

[100] Contracts (and trusts) protected interests arising from promises; tort protected against harms, while restitution enforced the right to be restored to benefits unjustly obtained by another at his expense: 'Restitution' (1938) 54 *LQR* 29 at 31-2.

[101] *Sinclair* v. *Brougham* [1914] AC 398.

[102] Winfield, *Province* (n 53 above) 119.

[103] Book Review, (1931) 8 *Bell Yard* 19 at 22.

[104] Eg Lord Wright, 'Sinclair v. Brougham' [1938] *CLJ* 305, arguing that this case 'demonstrates a category of claims distinct from contract, or tort, or trust (express or resulting), the essential principle of which is that the defendant should not be unjustly enriched at the expense of the plaintiff.'

[105] *United Australia Ltd* v. *Barclays Bank Ltd* [1941] AC 1. See also Lord Wright's

Ironically, the theory of unjust enrichment was to flourish more strongly in England than in the United States.[106] As law schools became increasingly interested in instrumental, or policy-based analysis, an area of law which appeared grounded in a formalist methodology fell out of fashion. Equally, the fact that the Restatement still abounded with terminology derived from the old forms of action and division of law and equity made it seem increasingly unfamiliar to lawyers bred under a modern, simplified form of procedure.[107] In 1987, Douglas Laycock reported that restitution was not systematically taught in law schools and was not litigated frequently enough to generate a fully developed body of precedent in each American jurisdiction.[108] By then, after an abortive attempt to update the 1937 Restatement, there were even some doubts whether there was a coherent subject worth restating. The ALI's initial response was to turn to include the matter pertaining to restitution in a restatement of remedies, but in 1995 the project of a new Restatement was revived with Andrew Kull as reporter.

In the meantime, the subject had grown in England into the most vibrant area of private law scholarship. Two works proved to be particularly influential. The first was Goff and Jones's *The Law of Restitution* (1966), which was the first English textbook to treat the subject as a distinct whole, in the manner of the Restatement. In 1985, Peter Birks published *An Introduction to the Law of Restitution,* which was the first English attempt to put the subject into a theoretical framework. It was not long before the courts began to recognise unjust enrichment as a distinct source of obligations in English law.[109] The category which had been given the name 'restitution' at the time of its first theoretical recognition was renamed 'unjust enrichment' by its leading proponents,[110] to focus on the event giving rise to the obligation, rather than the law's response to it.

However, there has remained disagreement both as to the scope of the doctrine and the principles underlying it. A number of jurists have cast doubt on whether the cases collected in this category are properly explained as reversing unjust enrichments, or can be explained by more traditional doctrines. Some have indeed doubted whether there is a distinct category of obligations based on the principle of unjust enrichment. It has been argued that the cases are better explained as proprietary claims, in which the claimant's property is returned to him, or

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comments in *Fibrosa Spolka Akcjna* v. *Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 61.

[106] J. Langbein, 'The Later History of Restitution', in W.R. Cornish et al, *Restitution: Past, Present and Future* (1998) 61.

[107] Andrew Kull, 'Three Restatements of Restitution', (2011) 68 *Washington and Lee Law Review* 867 at 371.

[108] Quoted in Kull, 'Three Restatements' (n 107 above) 877.

[109] *Lipkin Gorman (a firm)* v. *Karpnale* [1991] 2 AC 548.

[110] See P. Birks, *Unjust Enrichment*, 2nd ed (1985), C Mitchell, P Mitchell and S Watterson, *Goff and Jones: the Law of Unjust Enrichment*, 8th ed (2011).

as contractual ones, or as claims in tort.[111] Despite these claims, however, unjust enrichment is now well-rooted in the case law, and continues to thrive as an area of academic debate. Nonetheless, its proponents are not united in their vision of the subject. According to its English proponents, led by Birks, the principle which is said to underlie the doctrine is that of reversing a defendant's unjust enrichment at the claimant's expense. When Birks articulated this principle, it was not set out as a normative one, but as a classification of what was done in particular cases in the common law. Nor was there any room for equity in his taxonomy.[112] While the enrichment had to be 'unjust', what counted as injustice was not seen by English unjust enrichment lawyers in moral terms. A transfer was unjust if the claimant had no intention to transfer the wealth (as where it was taken by the defendant without lawful authority, or was paid over by mistake, or by duress), or where a contract under which wealth had been transferred had totally failed. It might also be unjust in particular situations where policy dictated that it was so, without looking at the claimant's intentions towards the defendant. However, some Australian jurists have seen unjust enrichment as embodying equitable ideas of unconscionability, derived from the jurisprudence of the Court of Chancery. Where for English lawyers like Birks, the concept of 'unconscionability' was a redundant - since it would always be unconscionable to retain an unjust enrichment - the Australian version invoked concepts of conscience to determine whether the enrichment was unjust in the first place.[113]

By the end of the twentieth century, it was clear that the 'formalist' quest for comprehensive underlying principles which could explain the distinct nature of contract, tort and unjust enrichment had not generated theories which could gain universal assent. Legal scholars and judges have continued to seek the best explanations of developing doctrines in various areas of the law, in order to give the best coherence to the cases under review, but without necessarily seeking consistency or a rational order across the entire subject. In an era of increasing statutory intervention, and where the lines between public and private law have become more permeable, the vision of an autonomous private law which developed in the nineteenth century seems increasingly hard to maintain. Nonetheless, the distinct territories of contract, tort and unjust enrichment continued to be mapped out and debated, even as some critics argued that these categories can serve no more than a provisional, pedagogic function. Philosophically-minded jurists have continued to develop theories which can best explain the the nature and purpose of private law, just as economists and social theorists have continued to explore the operation and effect of law; though exactly how far the philosophical approaches and empirical approaches can exert an actual influence on the decisions of the

[111] See eg S J Stoljar, *The Law of Quasi Contract* 2nd ed (1989), P Jaffey, *The Nature and Scope of Restitution* (2000), S Hedley, *A Critical Introduction to Restitution* (2001).

[112] Birks, *Unjust Enrichment* (n 110 above) 24.

[113] See further Ross Grantham, 'The Equitable Basis of the Law of Restitution,' in Simone Degeling and James Edelman, *Equity in Commercial Law* (2005), 349-380 and the essays in Charles Rickett and Ross Grantham, *Structure and Justification in Private Law: Essays for Peter Birks* (2008).

court remains a matter of debate.[114]

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[114] For one analysis of the impact of perhaps the most influential theory, see I Englard, 'Law and Economics in American Tort Cases: A Critical Analysis of the Theory's Impact on Courts' (1991) 1 *University of Toronto Law Journal* 339.