A – perhaps the – distinctive feature of the common law of contract is its requirement of consideration. Yet few lawyers show any fondness for the rule, with its survival in common law jurisdictions often tempered by the rejection of much of what the rule once stood for (see eg Williams v Roffey Bros [1991] 1 QB 1, Musumeci v Winadell (1994) 34 NSWLR 723, Antons Trawling v Smith [2003] 2 NZLR 23, NAV Canada v Greater Fredericton Airport 2008 NBCA 28). So we might say that, while these jurisdictions once converged around the centrality of consideration to contractual rights and duties, we now see a similar convergence around the idea that it is an obstacle to contract’s real job of enforcing seriously intended promises. The upshot is that consideration should either be revised and reinterpreted as an intent-focussed test or be replaced.

I suspect that consideration has rather more going for it than all this suggests and that, even if, all things considered, it ought be reformed or rejected, it deserves a better defence than it has been getting. A first step here is to dispose of the idea that consideration is evidence of contractual intention or that it serves some sort of cautionary function. The fact that consideration most often lies in the very exchanging of promises shows that it (ordinarily) does a lousy job of evidencing or cautioning the making of such promises. So, contrary to much that is written, I think we should take consideration to stand against the idea that intention is both a necessary and a sufficient ground for contractual obligations. Rather a defence of consideration needs to be addressed to the two claims which give it its essence: (1) gratuitous promises, however serious, are in and of themselves insufficient to ground legal rights and duties and (2) the presence of consideration makes the difference, providing a reason for legal enforcement missing from the case of the simple, gratuitous promise. I’m going to have a go at justifying both claims and to argue that, in providing consideration, a promisee’s position is changed vis-à-vis the promisor in such a way as to support giving him a right to demand, if not performance of that promise, then at least compensation for his expectation losses.