Book Review: Justice in Transactions Benson Peter

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Review of *Justice in Transactions*

Jennifer Nadler

In the opening lines of *Justice in Transactions*, Peter Benson asks: [c]an the doctrines of contract law be accounted for in their own terms and on a basis that is morally acceptable from the standpoint of justice? (ix). Benson’s answer is yes. He offers a theory of contract law’s own normativity, a normativity manifested in contract law’s fundamental principles and doctrines and intelligible apart from any goals, like efficiency or promissory fidelity, that we might find independently valuable; and he argues that this immanent normativity is morally acceptable from the standpoint of justice.

Benson’s ambitiously systematic and detailed account is intended, in part, as a response to two understandings of contract law that have dominated contract theory: the economic analysis of contract law and the promissory theory of contract law. Benson shows that economists and moralists, though theoretical rivals, operate on the basis of an identical assumption – that contract law is normatively mute and its normative content is therefore to be filled in by an independent value: either efficiency or promissory fidelity. Against these approaches, Benson aims to bring out contract law’s own normativity, contract law’s own conception of justice in transactions as it is reflected in contract law’s central doctrines (xi). The idea that emerges from his careful analysis is that at contract formation, the parties’ agreement and exchange of promise-for-consideration effects a transfer of ownership in the thing promised from promisor to promisee.

As Benson says, his most important argument is that this understanding of contract as a transfer of ownership is not externally imposed on the basis of a preferred moral or political philosophy. Contract as transfer, Benson argues, emerges from an internal analysis of contract
law’s own doctrines (xi). The book’s structure reflects this substantive claim. Whereas the economic and promissory accounts of contract law begin with a value—efficiency or promissory fidelity—that is compelling apart from and independent of contract law, Benson begins from contract law and seeks the value that is immanent within it. He thus begins, not with an elaboration of an independent value or conception of contract law’s point, but with contract law. Part One is an interpretation of contract doctrine in an effort to draw out contract law’s own conception of justice in transactions. Part Two aims to show that contract law’s conception of justice in transactions is morally justified.

What is “justice in transactions,” the theory of contract law that rivals economic and promissory theories? Justice in transactions is the set of principles that free and equal persons could accept as a justification for contractual enforcement against an individual who has changed her mind about performance. What are those principles? To summarize hundreds of pages of rich and careful argument in a few sentences, the idea is that a voluntary, promise-for-consideration agreement transfers a property right in the promised consideration to the promisee. When contract is so understood, breach violates, and expectation damages vindicate, a widely accepted principle of private justice: do not interfere with what rightfully belongs to another (66).

The result of this understanding of justice in transactions is that for Benson, justice in transactions is justice in transfers of ownership. Almost all the theoretical controversies of contract law are answered by asking one of the following three questions. What is necessary for a valid transfer of a property right? What, from an objective point of view, did the parties agree to transfer? If the promisor does not transfer the agreed upon performance, how should this property right violation be remedied? The doctrines of consideration, offer, and acceptance answer the first question. The doctrines of implied terms, frustration, and unconscionability
answer the second. The expectation measure of damages answers the third. In this review, I will explore more carefully Benson’s treatment of consideration, unconscionability, and expectation damages, and raise some doubts about whether the idea of contract as a transfer of ownership in the thing promised animates or illuminates these central contract law doctrines.

**Consideration**

Lon Fuller argued that consideration is a formality that allows contracting parties to signal to one another and to courts that they intend to enter into a legally binding relationship.¹ This instrumental argument, though intended as a defense of consideration, has paved the way for calls for its abolition.² If consideration is a formality, why not dispense it with in favour of other, less complicated and more accurate, ways of signalling an intention to be legally bound?

Benson answers this question by offering a non-instrumental account of the doctrine of consideration. He argues that the doctrine of consideration is a necessary condition of contract formation because it is a requirement of a non-physical transfer of control in the thing promised. The key to understanding the role that consideration plays in the law of contract begins with thinking about the law of gift. Benson argues that in gift, the transfer of control in some object from donor to donee is effectuated through a physical transfer—this is the requirement of delivery. In contrast to gift, the executory contract is a non-physical transfer of ownership, for the promisee acquires a right to the thing promised just through the exchange of promises. And, Benson continues, reciprocity is required for a transfer of control in the case of a non-physical transfer:

¹ Lon L. Fuller, “Consideration and Form” (1941) 41 Columbia L. Rev. 799.
In the case of nonformal wholly promissory relations, to show that the promising constitutes a transfer of control rather than a relation of mere trust, it is essential that the promise be made for and with another promise (or act) so that both function as coequal constitutive acts that cannot operate or even be determined except reciprocally in relation with each other, and further that these mutually related promises embody in their purely represented nonphysical medium a transfer of things of value from out of the control of one side into that of the other through their united acts (63).

This is not easy to understand. Why can I transfer non-physical control in some object to you only if you transfer control in some object to me in return? There is nothing in the concept of a non-physical transfer of control that demands reciprocity as opposed to mere acceptance. It’s not clear why the intention to transfer control rather than invoke trust is objectively apparent when something is promised in exchange for something else but not apparent when the promise is gratuitous. Moreover, there are other, less complicated, and more accurate ways of signalling an immediate intention to transfer control besides insisting on an exchange. One could, for example, state that intention directly. In short, reciprocity and transfer of control seem to be unrelated concepts and nothing in the passage above explains the relation. On Benson’s account—the account that tries to draw consideration out of the idea of a non-physical transfer of control—the necessity of consideration remains completely opaque.

One might think that the important difference between gift, as a completed transfer, and contract, as a promise to transfer, is that gift imposes no obligations on the donor, whereas contract does impose obligations on the promisor. And one might think that in the relations between equals, coercive obligations must always be reciprocal, so that one is only forced to serve another whose service one can demand in return. But this account of the necessity of consideration does not emerge from the concept of a non-physical transfer. Nor will it emerge from a careful study of the doctrine of consideration’s elaboration in case law, for this will only show the courts’ increasing tendency to question the need for a doctrine whose significance they
do not understand. An account of consideration as a requirement of reciprocity in obligation is part of a theory of what interpersonal obligations are consistent with the equality of free agents, and so part of a theory of what makes legal coercion legitimate. There is no possibility of arguing for the conceptual necessity of consideration and then asking, at a later stage, whether the requirement of consideration is morally justified. Consideration is a normative requirement and the argument for its necessity must be a moral one.

**Unconsicionability**

The doctrines of consideration and unconscionability seem to stand in fundamental tension with one another. A court will not inquire into the adequacy of consideration—even a peppercorn may be valid consideration for a house. But the doctrine of unconscionability permits the scrutiny that consideration excludes—it allows the court to inquire into the substantive fairness of the exchange and set aside a bargain that is grossly unequal. Benson denies that there is any tension between these two doctrines. The doctrine of unconscionability, he says, “builds on and is continuous with the requirement of consideration” (167). This argument weakens the overall claim to draw contract law’s normativity out of settled law, for it depends on effacing unconscionability’s equitable character, its status as an exception to the common law’s indifference to the substantive fairness of the exchange. But I will leave this doctrinal objection aside and consider the theoretical argument for the continuity between consideration and unconscionability. This argument proceeds in several steps.

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3 See, for example, Williams v Roffey Brothers and Nicholls (Contractors) Ltd [1991] 1 QB 1 (CA); NAV Canada v Greater Fredericton Airport Authority Inc. 2008 NBCA 28, 229 N.B.R. (2d) 238, 290 D.L.R. (4th) 405; Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal [2009] 2 SLR(R) 332.
First, Benson argues that the doctrine of consideration does not say that the promised considerations need not be equivalent; consideration is merely indifferent to equivalence because its concern is formal two-sidedness (175-176). Second, equal persons cannot be presumed to confer gifts on one another. Accordingly, when they agree to give their property to another (or perform a service for another), they are presumed to demand equivalent value in return (181-182). We therefore need a doctrine, like the doctrine of unconscionability, that is concerned with equivalence in exchange. Third, the measure of equivalence is the market value of the things exchanged, since market price is objective in the sense that it does not reflect the particular point of view of any single market actor (184-185). Fourth, the doctrine of unconscionability says that any exchange for a price that is grossly below the market price stands in need of explanation, since parties are presumed to transact for equal value (182). Fifth, since freedom of contract demands that it be possible for free and equal agents to decide to transact for less than equal value, yet the equality of persons entails that no one can be presumed to transact for less than equal value, the doctrine of unconscionability asks whether a gross deviation from the market price was intended as a gift or whether the only explanation for the deviation is ignorance or inability to access a market price. Where the reason for the inequality in exchange is the former, the agreement stands; where the reason for the inequality is one of the latter, the agreement must be set aside, since in those cases, the intention to confer a gift has not been established (182).

Let’s assume that it’s true, as I think it is, that the law never assumes that equal persons intend to confer gifts on one another. The fundamental doctrines of contract formation seem to elaborate this basic principle. An offer requires a voluntary manifestation of a fully crystallized intention to part with one’s property on the express or implied terms; an acceptance requires a voluntary manifestation of a fully crystallized intention to part with one’s property on identical
terms. The doctrine of consideration already ensures that the obligation to exchange arises only in relationships of reciprocity. It is thus implausible to say that a law of contract that lacked a doctrine of unconscionability would violate a presumption against gifts. The presumption against gifts does not explain why we need a doctrine that allows a party—who has already fulfilled the requirements of contract formation and so has reasonably indicated her intention to enter into an exchange rather than a gift transaction—to back out of a deal she didn’t realize was a bad one. Moreover, it’s not clear how an inquiry into whether a transaction evincing the form of an exchange was intended as a gift could be consistent with the objective theory of contract formation, which holds people to the reasonable meaning of their external words and deeds.

There is another difficulty. Benson argues that the market price sets the standard of equivalence that equal persons are presumed to intend in their transactions. But, as Benson recognizes, freedom of contract means that it must be possible for individuals to choose to demand less than market equivalence from their contracting partners. For example, A may choose to sell her house to B for $100,000 although the market value of her house is $1,000,000. For Benson, unconscionability works by ensuring that it was A’s intention to make a gift of $900,000 to B and that the disproportionate exchange is not due to A’s ignorance or inability to access a market price. If a gift was intended, the contract is enforceable. However, this explanation requires there to be a category of contract that we might call an executory gift—an intended gift promise—and yet there is no such category. Gifts are enforceable only on delivery, whether real or symbolic. Far from drawing theory from doctrine, this account of unconscionability invents a category of contract that does not exist in the common law; indeed, it

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4 For a similar criticism of Benson’s earlier work, see Alan Brudner, The Unity of the Common Law (2nd edn, OUP 2013) 209 n. 82.
invents a category of contract that *cannot* exist, because an executory gift is nothing other than an unenforceable gratuitous promise.

The common law has the answer to this problem. It agrees that the parties to a contract are presumed to intend an equal exchange. But the common law treats the value of any thing that is exchanged as subjective and contingent, making the only proper judges of equivalence the parties themselves.\(^5\) And the evidence that the parties judge the things exchanged to be of equivalent value is their agreement to exchange. Indeed, it is precisely because no one is presumed to confer a gift on another that the agreement to exchange is understood by the common law of contracts as an agreement on equivalence. Thus, provided there is a true meeting of minds, even an agreement to sell a house for $100,000 when the market value is $1,000,000 is enforceable as an equivalent exchange—as judged by the parties’ subjective valuations of the things exchanged—and not a promise to make a gift of $900,000. The presumption of equivalence in exchange is reconciled with the parties’ freedom to set the terms of their interaction without the invention of the executory gift contract because, on the common law’s view, equivalence is established by the meeting of the minds, not the market.

Yet, if the measure of equivalence is the parties’ agreement, the doctrine of consideration’s refusal to inquire into the adequacy of consideration is not simply a matter of the division of labour between doctrines. Rather, the refusal to inquire into the adequacy of consideration reflects a certain conception of the relationship between persons and things. In

\(^5\) *Haigh and another v Brooks* [1835-42] All ER Rep 438 at 441. In his first edition (1876), Pollock, quoting Hobbes’ *Leviathan* wrote: “[t]he value of all things contracted for is measured by the appetite of the parties, and therefore the just value is that which they be contented to give.” See Pollock, *Principles of Contract* (1st edn) 154. See also the early editions of *Chitty on Contracts*. For example, in the fourteenth edition, the editor writes: “...it is not essential that the consideration be *adequate* in point of actual value—the law having no means of deciding upon this matter.” JM Lely, ed, *Chitty on Contracts*, 14th ed (London, UK: Sweet & Maxwell, 1904).
particular, it reflects the denial that there is an objective measure of a thing’s value beyond the parties’ agreement. Unconscionability, on the other hand, denies that the fairness of the exchange is settled by the parties’ agreement on equivalence and measures the exchange according to an objective conception of fairness. The fundamental tension between consideration and unconscionability has thus resurfaced. Implicit in the doctrines of consideration and unconscionability are competing conceptions (formal vs. substantive) of the fairness of a bargain, not mutually supporting conceptions of exchange.

Although Benson says that he will draw theory from doctrine without relying on a preferred moral or political philosophy, he depends on a presumption of human equality in order to explain why we have a doctrine of unconscionability. I have argued that this presumption of equality fails to explain the necessity of unconscionability, because the doctrine of consideration, in requiring a formally two-sided exchange, already expresses a conception of what respect for equality demands. Thus, in order to account for the doctrine of unconscionability, we need a moral argument for the insufficiency of formal equality, and so for the necessity of an equitable doctrine that recognizes that a voluntary, formally equal exchange may nevertheless be subordinating.

**Expectation Damages**

Fuller and Perdue famously doubted whether the expectation measure of damages is intelligible as a form of compensation and argued that it must serve the efficiency goals of encouraging reliance and deterring breach.\(^6\) Benson seeks to justify the expectation measure of damages on non-instrumental grounds and to show that it coheres with the compensatory character of private law remedies. We can answer Fuller and Perdue’s challenge, Benson argues,

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if we can show that in contract, the plaintiff has some entitlement, some asset, that is exclusively hers in relation to the defendant and that in breach, the defendant does something that constitutes a taking of or injury to that asset (6). More specifically, if contract formation is a transfer of ownership in the thing promised from promisor to promisee, then breach deprives the promisee of something that she owns as against the promisor, and expectation damages compensate for that deprivation by putting the plaintiff in the position she would have been in had the defendant respected her entitlement.

What would the contract remedy look like if it was a vindication of the promisee’s ownership of the very thing she was promised? It seems to me that an intentional breach of contract, like an intentional property tort, would be a crime, the profits of breach would belong to the promisee, anticipatory breach would be enjoinable, the promisee’s taking the thing promised after performance is due would be an act of self-help, and specific performance would be the standard remedy for breach, available to the promisee as a matter of right. But the contract remedy does not look like that. On the contrary, the contract remedy generally draws no distinction between intentional and unintentional breach, intentional breach of contract is not a crime, the breaching party is entitled to the profits of breach, the remedy for anticipatory breach is damages, the promisee’s taking of the thing promised is theft, the normal remedy for breach is damages, and the burden is on the promisee to establish that a performance remedy is a justified departure from the normal remedy. It is hard to see how a contract remedy with these features could be understood as vindicating the promisee’s ownership right in the very thing promised, for that is precisely what it appears to deny. 7

7 I have made an argument along the same lines in Jennifer Nadler, “Freedom from Things: A Defense of the Disjunctive Obligation in Contract Law, Legal Theory, https://doi.org/10.1017/S1352325221000161. Published online by Cambridge University Press: 7 September 2021.
Benson’s response to some of these criticisms begins by denying that expectation damages is the normal remedy for breach and specific performance the exceptional one (270). Again, this weakens the claim to draw theory from settled contract doctrine, for specific performance is an equitable *exception* to the standard common law position, which is that the remedy for breach of contract is expectation damages. However, even if it were true that contract law gives no special priority to expectation damages, we still need to understand how expectation damages could vindicate the promisee’s right to receive the very thing promised. The following is a reconstruction of Benson’s argument.

Sometimes, a reasonable interpretation of the parties’ agreement is that they have bargained for a unique good—this antique china jar, for example. In that case, the remedy for breach is specific performance, since only specific performance gives the promisee the very thing she was promised. At other times, a reasonable interpretation of the parties’ agreement is that they have bargained for a generic good, for example, a widget. If what is promised (from an objective point of view) is not a particular widget but rather *any* widget, expectation damages, the amount of money that allows the promisee to go into the market and purchase a widget for the contract price, gives her the very thing she was promised (268).

But this response is unsatisfactory. On Benson’s account, any promised good is either generic (non-particularized) or unique (non-substitutable). But many contracts are for goods that are particularized—hence not generic—but substitutable—hence not unique. Suppose A agrees to purchase B’s used 2012 Honda Civic. It is not reasonable to interpret this as a contract for *any* used Honda Civic. This is a contract for a particularized good—for this very car offered by the promisor—not a generic one. If the promisee is to receive the *very thing* promised, this should be a case for specific performance, not damages. But it is not. Because the good in question is not
unique, the promisee will receive, not the particularized good that was promised, but the money needed to buy its reasonable substitute. This is so even if it is possible for the promisor to specifically perform the contract. In this common class of contracts for goods that are particularized but not unique, there is no plausibility to the claim that the remedy vindicates an entitlement to the very thing promised.8

Benson persuasively shows the kind of argument we need to respond to Fuller and Perdue’s challenge to the contract remedy’s intelligibility as a form of compensation: we need to conceive contract formation as a transfer of entitlement from promisor to promisee. But what is the nature of that entitlement? The move from contract as a transferred entitlement to contract as a transferred entitlement to the very thing promised comes too quickly, for there are other possibilities. Kant argued that the promisee acquires from the promisor an entitlement to the promisor’s deed9, and Hegel argued that the promisee acquires an entitlement to her property’s agreed upon exchange value.10 There is no settling this debate by thinking through the idea of compensation, for compensation is indeterminate with respect to the nature of the loss that is compensated. Here we need a theory of right, and a moral argument about the kind of right that can be acquired through an agreement to exchange.

I have questioned whether the idea of contract as a voluntary transfer of ownership in the thing promised animates or illuminates several central doctrines in contract law. However, these criticisms of Justice in Transactions take place on the basis of a fundamental agreement with its main claim: that contract law’s immanent normativity has been obscured by economic and

8 Ibid.
promissory theories, which have imposed on contract law goals and values that are not its own. In persuasively unsettling firm and longstanding assumptions about the policies and values that contract law serves and showing readers what it means to treat contract law as a locus of normativity, *Justice in Transactions* is one of the most important contemporary contributions to the understanding and justification of the law of contracts.