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REVIEW ARTICLE

On Justice in Transactions

Nick Sage*

Peter Benson, **Justice in Transactions: A Theory of Contract Law**, Cambridge, MA: Harvard University Press, 2019, 610 + xiv pp, hb £68.95

> 'Of particular justice and that which is just in the corresponding sense, one kind is that which is manifested in … transactions.' – Aristotle[1]

> 'Performance is necessary for the simple reason that otherwise what the other owns would incur injury, since as a result of the [contract] the thing has passed completely into the other's ownership. … Performance is therefore … a consequence as a pure matter of right, that I should not injure what I have recognised as owned by the other.' – Hegel[2]

> 'I emphasise that the conception of the person as free and equal is a normative conception … Since ancient Greece, both in philosophy and in law, the concept of the person has been that of someone who can take part in, or play a role in, social life, and hence who can exercise and respect its various rights and duties.' – Rawls[3]

The title, like everything else in the book's six hundred pages, is not chosen lightly. Among other things it signals Benson's focus on contract law's relational structure. A contract is a relationship in which two (or more) persons participate. A theory of contract should consider the justice of that relationship. Throughout the book Benson keeps an eye on this seemingly simple point and draws out striking implications.

*Assistant Professor, LSE Law Department. Thanks to Peter Benson, Hugh Collins, Paul MacMahon, James Penner, Emmanuel Voyiakis, and all the participants at the LSE symposium on *Justice in Transactions*. Thanks also to the anonymous MLR reviewers.

1 *Nichomachean Ethics* in J. Barnes (ed), *The Complete Works of Aristotle* (Princeton, NJ: Princeton UP, W.D. Ross tr, 1991) 1130b30; *JT* 30.
2 G.W.F. Hegel, *Lectures on Natural Right and Political Science* (Oxford: OUP, M. Stewart and P. Hodgson tr, 2012) §35; *JT* 562 n7.
3 J. Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: HUP, 2001) §7.6; *JT* ch 11.

The title also signals Benson's vision of the kind of relationship a contract is: a transactional acquisition, or more simply, a transfer.[4] Consider a transfer of property by physical conveyance:

> Both in everyday experience and in law, we are familiar with the possibility of transferring ownership in something from one person to another … A first person, owner of a book, hands it over to a second with the words 'this is now yours'. Assume that the second takes it. From a very early age, we understand that this interaction simultaneously divests the first of ownership and vests it with the second.[5]

Similarly a contract, for Benson, is a sort of reciprocal transfer: a first person confers something on a second and acquires another thing from them in return. The parties mutually recognise each other as owners, as against each other, of the respective things.[6] Though each party gains a legal right to performance, that right is not itself what is transferred, but a consequence of the transfer of some substantive thing.[7] Of course, the 'things' for which parties contract include not just existing physical objects, but also goods yet to be produced, incorporeal interests, services, situations, ideas, etc – so we must embrace a luxuriant ontology here.[8] And since parties can contract through words alone, without actually moving any things between themselves, the transfer that occurs at contract formation must be representational or ideal – taking place, we might say, in a 'purely represented nonphysical medium' or 'realm of ideation'.[9]

Conceiving of a contract as a property-like transfer allows Benson to solve a theoretical puzzle posed, in our time, by Lon Fuller.[10] Fuller wondered why the law should remedy breach of contract by awarding expectation damages or specific performance. He thought these remedies cannot be compensatory, since they do not make good any injury or deprivation the plaintiff has suffered, but rather give her something she never previously had. Benson responds that the remedies make sense on his proprietary view. If a contract is akin to a transfer of property, breaching a contract is like depriving someone of their property. Just as the law rightly compensates a property deprivation by requiring the property's restoration or payment of the equivalent in money damages, the law rightly compensates a breach of contract by requiring the provision of the specific thing promised, or payment of expectation damages designed to make it as if that occurred.

4 Though 'transfer' suggests that what one party acquires must be held by the other prior to contracting, creating needless perplexity about contracts for goods yet to be produced, services, etc. *JT* 324; 340-341.

5 *JT* 8.

6 In the first instance the transfer operates *in personam*, though it may also have *in rem* implications for third parties. *JT* 83-100, 349-360.

7 *JT* 323-324.

8 *JT* 53, 340-341.

9 *JT* 63-64, 320-321, 324-325, 334-342. cf G.W.F. Hegel, *Philosophy of Mind* (Oxford: Clarendon, William Wallace and A.V. Miller tr, 1971) §493; *JT* 563 n11, 565 n32. The transfer must occur at formation because thenceforth the contract is enforceable. Any subsequent physical delivery is, as between the parties, merely a way of ensuring factual conformity with the normative situation established at formation. *JT* 65-66, 252.

10 L.L. Fuller and William R. Perdue, Jr, 'The Reliance Interest in Contract Damages: 1' (1936) 46 Yale LJ 52; *JT* 5-11, 299-302, 314-316, 361-362.

Fuller became puzzled about contract in part because other undertakings or assurances, such as gratuitous promises, are not similarly enforceable. Benson responds that a non-contractual promise does not amount to a property-like transfer, whereby the parties mutually recognise each other as acquiring ownership of things. It is a relation of trust and respect in which each side depends on the other's moral integrity. Hence it should not attract compensatory legal remedies, though it is of course morally significant.[11]

In developing his view of contract, Benson disavows any reliance on normative ideas from outside the law itself – he aims to interpret, not prescribe.[12] He seeks a 'public basis of justification' for contract: to justify the institution to those who participate in it by elucidating ideas already present, if only latently, in the common law.[13] (This is a theory of the common law, though some of it may bear on the civilian tradition.)[14] Consequently, the greater part of *Justice in Transactions* amounts to a sustained – and powerfully illuminating – engagement with contract doctrine. In the last part of the book, Benson situates the ideas he has gleaned from contract law in a broader context, connecting them up with other institutions of the liberal state such as markets and systems of distributive justice.

Following this method, Benson concludes the contractual relationship is just because it instantiates a certain conception of the individual person of whom liberals, at least, should approve. This is the person as an *owner*: someone who is independent, who is free to control things (but not other persons), and who recognises and respects the same freedom in others. While this conception of the person is not the only one worthy of moral or legal validation, it deserves attention from some of our institutions such as contract.[15]

Justice in Transactions stands at the confluence of a number of currents in legal theory. If private law theories are divided into, on one hand, broadly moral or philosophical approaches, and on the other, more scientistic work influenced by economics, psychology, sociology, and so on, Benson's account falls in the former camp. More particularly, *Justice in Transactions* advances the theory of corrective justice, based on Aristotle's insight that private law concerns the justice of bilateral relationships.[16]

Of the main moral theories of contract, promissory theories are currently the most fashionable, since reliance theories have fallen out of favour in recent decades. Transfer – or 'transactional acquisition – theories akin to Benson's are less popular, though far from unknown.[17] They can claim an august lineage in the philosophical tradition running from Grotius through Hegel, upon

11 *JT* 35-38, 397-413.
12 In Stephen Smith's terminology. S. Smith, *Contract Theory* (Oxford: OUP, 2004) 4-5.
13 *JT* 12.
14 *JT* 29.
15 *JT* ch 11.
16 A cognate approach has gained influence in contemporary moral philosophy. Key works include M. Thompson, 'What is it to Wrong Someone?' in R. Jay Wallace et al (eds), *Reason and Value* (Oxford: OUP, 2004); S. Darwall, *The Second-Person Standpoint* (Cambridge, MA: HUP, 2006); R. Jay Wallace, *The Moral Nexus* (Princeton, NJ: Princeton University Press, 2019).
17 See S. Smith, 'Towards a Theory of Contract' in J. Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford: OUP, 2000); E. Weinrib, *Corrective Justice* (Oxford: OUP, 2012) ch 5; A. Gold, *The Right of Redress* (Oxford: OUP, 2020) ch 4. Some theorists combine aspects of the

which Benson draws. Those philosophers, as well as viewing contracts as akin to property transfers, developed broader politico-legal theories incorporating liberal conceptions of the individual person. In the latter respect their work was continued in more recent times by John Rawls, whose influence also pervades Benson's book.

In this review article I will focus on Benson's intellectual commitments to a *relational* view of contract, linked to an essentially *proprietary* model of contract law,[18] and to a liberal conception of the *individual* person. I will trace Benson's treatment of some of the main contractual doctrines, suggesting his three commitments generate various tensions. I will then examine Benson's more explicitly theoretical claims about contract law's moral basis and its place in a liberal state. Finally, I will offer a critical perspective on *Justice in Transactions* as a whole by sketching an alternative approach that refocuses Benson's theory, emphasising some of his intellectual commitments while downplaying others.

OFFER AND ACCEPTANCE, AND THE OBJECTIVE TEST

Though it is a natural place for us to begin, Benson pointedly does not start with offer and acceptance. He views this doctrine, which specifies how a contractual relation is brought about, as a sort of companion to other doctrines that tell us what the contractual relation is – in particular, the doctrine of consideration.[19] Nonetheless, Benson believes offer and acceptance doctrine brings out an 'essential aspect of the … contractual relation', possessing features that are 'not just statistically or empirically usual, but in fact necessary and intrinsic'.[20] He takes seriously the conventional offer and acceptance analysis that came under attack in the twentieth century.[21]

Offer and acceptance, according to Benson, ensures that the two contracting parties relate to each other in a 'robustly bilateral' manner.[22] By making an offer, one party manifests her assent to a proposed transaction, and does so 'in a way that places the possibility of a second related decision in the hands of the other

promissory and transfer views. Complicating matters further, some philosophers of purely moral promises regard those too as akin to transfers. See D. Owen, 'Does a Promise Transfer a Right?' in G. Klass, G. Letsas and P. Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford: OUP, 2014). For Benson, 'theories that try to explain the legal obligation of contract as an instance of a general moral duty to keep one's promises or those that, conversely, construe the latter in terms that characterise the former (such as the idea that every promise involves a transfer of right between the parties) inevitably denature both and make it impossible for the two to coexist as inherently legitimate but distinct dimensions of our moral and legal public culture', *JT* 401.

18 I will not consider whether this model accurately portrays *property* law. I will take Benson to be articulating fundamental normative ideas that are, at least, often associated with property.

19 *JT* 22-23, 35-39, 101-104. Benson says this fits the relatively late historical appearance of offer and acceptance doctrine. *JT* 36, 103-104.

20 *JT* 39, 105.

21 See for example Cheshire and Fifoot's *Law of Contract* (London: Butterworths, 3rd ed, 1952) 28: 'The rules which the judges have elaborated from the premise of offer and acceptance are neither the rigid deductions of logic nor the inspiration of natural justice. They are only presumptions drawn from experience …'.

22 *JT* 102.

party'.[23] The other party, by manifesting his acceptance, does not merely signal to the offeror that she should go ahead, but contributes his own active decision to join with her in the transaction.[24]

Strikingly, Benson insists offer and acceptance must occur *successively*. '[A]t least ordinarily contract formation involves a first expression of assent (the offer) that precedes the second (the acceptance) in time, with the second being given after and in response to the first'.[25] This puts Benson at odds with influential American authorities, not least Arthur Corbin. It could also cause serious practical difficulties. As the Second Restatement observes, contracting parties often assent by signing duplicates of the same agreement.[26] Surely it should not be fatal if they sign simultaneously?

Corbin concluded that simultaneous assents may suffice after reflecting on a hypothetical, which Benson also ponders:

> a third person, C, prepares in advance terms of a possible agreement and communicates the terms in complete form, separately however, to each of the parties, A and B, telling them that if they wish to contract they should stand in each other's presence and repeat at the same time 'We mutually agree in accordance with the terms given to us by C'. A and B do so, saying, we may assume, precisely the same thing at the same time. There is no temporal difference between their utterances. While speaking, neither hears or knows, let alone responds to, what the other is simultaneously saying … and we are to suppose that the whole source of any possible contractual obligation between A and B is exclusively their expressions of assent.[27]

(It may help to imagine A and B saying the required words very quickly while covering their ears and shutting their eyes. We might also stipulate that they have never before interacted and neither has any inkling of the other's likely response to C's proposal.)

Unlike Corbin, Benson thinks there is no contract in the hypothetical because the two parties do not relate in the right way: rather than genuinely interacting, they carry out, side by side, individual performances that happen to coincide. Where, by contrast, offer and acceptance are successive – A makes a proposal to B, who then responds to that proposal – each party can reasonably view herself as linking up with the other at the moment she plays her respective part. Only where the parties interact in this way, Benson believes, can each reasonably hold the other to a binding contractual relationship. This relationship, Benson stresses, must be created by the parties themselves, not imposed on them from a third party perspective or by a formal rule of law.[28]

Slight variations to the hypothetical might allow a simultaneous assent to satisfy Benson. For instance, if the parties have a shared history and so expect each

23 *JT* 107; also 102, 104-105.
24 *JT* 102, 105, 107.
25 *JT* 107.
26 Section 22 cmt a. cf *JT* 498-99 n11.
27 *JT* 108.
28 *JT* 107-109.

other to agree at the crucial moment, and they prepare a ceremony of simultaneous assent on this basis, it might be reasonable for each to view herself as relating to the other while saying the relevant words.[29] A couple in a longstanding, loving relationship might prepare wedding vows of the form: 'Do you take each other as husband and wife?' / 'We do.'[30] Likewise parties have who have negotiated a mutually satisfactory business deal might assent by simultaneously signing duplicates.

Even if a role for shared history or other context allows Benson to escape serious practical difficulties, we might still be suspicious of the assumption that motivates his uncompromising theoretical position. Namely, the assumption that a contractual relationship must be generated wholly by the acts of the individual contracting parties, and be reasonably apparent from their own individual standpoints, at the moment they play their respective parts. Benson seems to be driven here by a thought about how two individuals, *as such*, can produce a relation.

A similar intellectual tendency appears in Benson's superb discussion of the objective test for contract formation.[31] He argues this is not the imposition of a third party perspective or a formal rule of law, but a matter of relational justice:

> Because the objective test specifies a standpoint that refers … to both sides in their mutual relation, it represents the transactional meaning of the parties' manifestations of assent that are the source of agreement between them. Indeed, it would seem difficult to conceive of another test that would more suitably reflect the bilateral character of the [contractual] relation.[32]

Yet when we dig deeper, the proper objective standpoint turns out to emerge from a consideration of what each *individual* contracting party can expect of the other. The proper standpoint, Benson claims, is that of the reasonable addressee of a communication. It is appropriate because the address*or*, when communicating with the addressee, 'must be taken to intend … that the addressee, as a distinct and separate person' will base her actions on her own understanding of the addressor's words.[33] However, the addressee cannot adopt just *any* understanding: since she contemplates joining a relation with the addressor, 'the perspective to which the addressee holds the addressor must be one that the addressee could reasonably expect the addressor to accept'.[34] Thus, Benson composes the objective standpoint by shuttling back and forth between the parties' individual standpoints.

29 cf I. Kant, *Metaphysics of Morals* in *Practical Philosophy* (Cambridge: CUP, Mary Gregor tr, 1996) §19 [6:272] (on the need for two 'preparatory' and two 'constitutive' wills); cf *JT* 499 n 11.
30 cf S. Ward Hutton, *Minister's Service Manual* (Grand Rapids, MI: Baker Books, 2003) 30.
31 *JT* 110-117.
32 *JT* 114.
33 *JT* 113-114.
34 *JT* 114.

CONSIDERATION

Consideration, Benson believes, 'holds the key to understanding not only the prerequisites for contract formation but also the whole of contract law'.[35] He begins with Fuller's influential, notoriously unconvincing account, which accords the doctrine a congeries of formal and substantive functions.[36] Benson complains that Fuller focuses, not on the relationship the consideration doctrine mandates, but on policy concerns that might equally appear in a purely individual or broader social context. Fuller's formal functions – 'evidentiary', 'cautionary', and 'channelling' – are also played by formalities such as the seal, and could be designed to protect an individual party considered alone. In assessing consideration's substantive functions, Fuller balances an individualistic concern for a promisor's autonomy against the social goal of promoting economic activity.

Benson asks us to focus instead on the 'promise for consideration relation': a particular kind of relationship in which one party promises and the other promises or does something in return. Each party's contribution must be given in response to the other's, so that they are mutually related and reciprocally inducing.[37] At the same time, each party's contribution must 'move from', ie 'genuinely originate with', her, and not merely be the consequence of the other party's actions – such as a typical reaction of gratitude or love and affection.[38] While consideration need not be 'adequate', in the sense of economically commensurate, it must have 'sufficient' value in the eyes of the law – which, for Benson, means it must have some minimal 'use value': it must be '*usable* or *wanted* in the widest sense'.[39]

The promise-for-consideration relation, Benson believes, is not just a prerequisite for contractual enforcement. It is what a contract *is*.[40] (At least in the common law.) Many readers will doubt this claim. But even accepting it *arguendo*, they will want to know why – at least within the context of Benson's interpretive theory – consideration makes sense. Why should consideration be the common law's main principle of demarcation, which distinguishes contractual relations from other commitments that are not similarly enforceable, especially gratuitous promises?

Benson seeks to connect the promise-for-consideration relation to his proprietary model of contract. He claims parties who enter this relation can reasonably be viewed as undertaking a property-like transfer that is purely representational or ideal (occurring through words alone without any actual movement of things). Benson sometimes suggests that requiring a promise-for-consideration relation is simply the best way for the common law to ensure that the two

35 *JT* 36.
36 L. Fuller, 'Consideration and Form' (1941) 41 Colum L Rev 799; *JT* 42-47.
37 *JT* 50-52.
38 *JT* 48-50.
39 *JT* 53 (emphasis in original); also 177. The consideration must have some use other than making the contract enforceable – Benson endorses the rejection by some American authorities of 'sham' consideration. *JT 55*.
40 '[T]he requirement of consideration constitutes the contractual relation as such; consideration itself establishes and represents a particular kind of relation between the parties.' *JT* 42.

parties can be viewed as undertaking an ideal transfer. '[A] doctrinally more natural or simpler way' of representing a transfer 'seems difficult to imagine'.[41] But that is questionable – there seem to be more natural, simpler ways. Why not require the parties to say, perhaps in writing, 'We hereby recognise that A transfers ownership of x to B'? Or to pass between themselves a small symbol of the thing transferred, or to draw a picture representing the transfer? In any event, why should only the most natural or simple way of representing a transfer do? It might be truer to the common law's character for it to recognise methods of ideal transfer that are quite unnatural and complex.

The problem is that there is no obvious connection between consideration and the idea (even the pure idea) of a property-like transfer of control. Benson claims that, in contracting, I have 'placed my promise and whatever it contains beyond my control *because* I have specified it in terms of something that you must do from your side'.[42] The 'because' is inscrutable. Why, in order for me to transfer control of something to you, must you give me something back? This is like someone insisting that, in order for me to paint a portrait of you, you must paint my portrait too.

Benson also seeks to connect consideration to contract law's relationality. He claims the promise-for-consideration relation is more mutually participatory, or reciprocal, than a merely gratuitous promise, because the consideration-supplying promisee is more actively involved.[43] This too is questionable. A gratuitous promisee may engage in active reciprocal participation. Say you loan me a large sum gratis. I might participate in this transaction by drafting a handwritten agreement, debating it with you and amending it, enthusiastically communicating my acceptance, and signing the document; I might then invest the money in my business, keep you posted on my progress and seek your advice, and so forth. Conversely, a promisee who supplies consideration may barely participate at all. Giving the matter little thought, I might passively accept your doing some gardening for me, in exchange for letting you take a book of mine I care little about. Even assuming that a consideration-supplying promisee is somehow more actively participatory, it remains unclear why that precise level, or kind, of mutual participation should be required for a property-like transfer. (Why should no other level or kind suffice?) Again, the problem is that there are no natural connections between the relevant ideas here: between the supply of consideration and enhanced relationality;[44] or between enhanced relationality and a transfer of property-like ownership.

41 *JT* 68. Or again, 'the promise-for-consideration relation seems to specify in the most basic and general terms conceivable a kind of promissory relation that can reasonably be construed as transactional acquisition'.

42 *JT* 61 (emphasis added).

43 Or again, the parties do something *with* each other rather than *to* or *for* each other (*JT* 35); the relation is 'joined', 'equally active', and 'coequal' (35-36); 'genuinely and completely bilateral', 'two-sided', and 'symmetrical' (46); 'intrinsically relational', such that 'neither side … can be conceived … without the other', 'irreducibly copresent and relationally defined' (51-52); '[e]ach side has engaged the participation of the other in the most complete way available' (61); they are 'united' in a 'nexus' (63).

44 Of course one would have to concede that the promise-for-consideration relation is, say, more 'reciprocal' if 'reciprocation' means the supply of consideration.

It is perhaps unsurprising that Benson – who seeks to justify consideration, and who believes a contract is a thoroughly relational way of representing a property-like transfer – concludes that the promise-for-consideration relation is, as it were, the most relational relation, and the best way of representing a transfer. It would be surprising if the same conclusion were reached by someone who came to the law without relationality- and property- tinted glasses on. Still, even if that is true, it leaves Benson in good company. He joins a distinguished line of contract scholars who have found their own theoretical concerns partly realised in consideration doctrine. No less a theorist than Lon Fuller, preoccupied with legal forms, and with the trade-offs between individual autonomy and social goals, thought he could understand consideration in those terms.

The promise-for-consideration relation does a lot of work throughout *Justice in Transactions*, much of which is untouched by my criticisms. If consideration constitutes the contractual relationship, promissory estoppel must be a form of noncontractual, perhaps tort-like, liability.[45] The traditional privity rule makes sense, because contract law covers only those parties who participate in the promise-for-consideration relation.[46] So-called 'intention to create legal relations' doctrine may seem to be just another guise in which the law ensures a genuine promise-for-consideration relation.[47] The character of that relation might also help us understand implied terms, which fill out its necessary but unstated content.[48] Finally, Benson builds on his theory of consideration to understand what, for him, is contract's second most important doctrine, unconscionability.

UNCONSCIONABILITY

A good account of unconscionability, Benson believes, must attend to its substantive and not just its procedural aspect: its concern for the content of an exchange, not just the manner in which the exchange is agreed upon.[49] Benson stresses that both of these aspects are a matter of relational, not distributive, justice. While courts hold, for example, exorbitant salvage contracts unconscionable, Benson claims, a '"ship in distress agreeing to salvage for an exorbitant price" does not constitute a meaningful class of persons from the standpoint of social distributive justice'.[50]

Substantive unconscionability, in Benson's view, supplements and builds upon consideration doctrine as part of a 'doctrinal division of labour'.[51] Consideration, we have seen, requires only an assessment of the 'use values' of the things exchanged: each must be somehow usable or wantable.[52] The doctrine does not relate the respective things' use values to each other. By contrast, uncon-

45 *JT* 69-75.
46 *JT* 76-83.
47 *JT* 117-121.
48 *JT* ch 3.
49 *JT* 168-173.
50 *JT* 190 (emphasis added).
51 *JT* 321; also 176, 183.
52 n 39 above.

scionability addresses the things' 'exchange value': how much each is worth in terms of the other – 'so much of *x* equals so much of *y*'.[53] More particularly, Benson thinks the law requires *fair* exchange value, which means the price must not greatly diverge from competitive market rates. A minor divergence should not attract judicial attention, partly because the gaining party may be unaware of it, and even a major divergence is acceptable with clear donative or charitable intent,[54] say, if someone hires another at an above-market wage to work at a social enterprise café.

Why does it make sense for the common law to require substantively fair exchange? Sometimes Benson suggests only this kind of exchange is appropriately relational. Now, even if exchanges at fair value are somehow more, or differently, relational, one might wonder why that particular level or kind of relationality is required to achieve a property-like transfer. Again, there is no obvious connection between the relevant ideas here.

In any event, Benson's two main arguments about the relationality of fair exchange value strike more particular difficulties. First, Benson claims it is crucial to relate the *things* exchanged – by assessing their exchange value, and not just their individual use values.[55] However, this runs up against a compelling objection well articulated by James Bernard Murphy.[56] Murphy argues that justice is surely a matter of relations, not between things, but between persons. To insist on a normative connection between the *things* parties exchange is a sort of commodity fetishism. We must consider the qualities of the contracting *parties*. (This allows us to explain why a substantively equal exchange may nevertheless be unjust, for example, if procured by coercion; and an unequal exchange may be just, for example, if done with donative or charitable intent.)

Benson's second main argument does look to the contracting parties, rather than just the things they exchange. When the parties contract at fair exchange value, Benson argues, their transaction embodies judgments of mutual reasonableness rather than merely the pursuit of individual self-interest. Each party's actions can be said to embody a judgment about what the other deserves to get in the exchange: I have assessed how much of my x you are due for your y; you have made a mirror-image assessment.[57] Yet, even if this judgment can, and should, be attributed to each party,[58] the judgment presupposes an independent account of what a contracting party deserves. We need some independent reason to think she deserves fair exchange value – and not, for instance, merely to receive something of use value.

Benson does supply independent reason to think contracting parties deserve fair exchange value. He claims the parties must be viewed as 'separate and independent persons', who are presumed not to give away their 'purchasing power'. '[N]o one is presumed to want to give away one's own for nothing or to intend the enrichment of another'.[59] This presumption may be displaced by evidence

53 *JT* 175-184.
54 *JT* 182-187.
55 *JT* 176-177, 386-387, 389.
56 B. Murphy, 'Equality in Exchange' (2002) 47 Am J Juris 85.
57 *JT* 177-178, 181-182, 388.
58 The attribution would presumably be objective rather than subjective.
59 *JT* 181.

of donative or charitable intent, as in a hire at a social enterprise café.[60] However, it is not merely a defeasible generalisation about what parties usually happen, as a matter of fact, to intend. It is rooted in the normative conception of the individual person, as an independent owner, that Benson takes to underpin contract law as a whole.[61] Thus, we arrive at the rather surprising conclusion that the requirement of substantive fairness *inter partes* is based, ultimately, on a commitment to a strong form of individualism.

Finally, Benson sometimes argues for a different sort of link between fair exchange value and his conception of the individual person as owner. He says that when parties contract at fair exchange value they necessarily recognise each other as owners – as beings who have the capacity to control things, and who can be parted from their things only with consent. After all, each party must entice the other to give up their thing consensually by providing something else in exchange. However, the need for the parties to recognise each other as owners would seem to arise, not because they make assessments of *fair exchange value*, but just because they participate in an *exchange*.[62] If all substantive fairness requirements were abolished but the rest of contract (and property) law left intact, we could presumably still say that contracting parties recognise each other as owners – after all, each must entice the other to part consensually with their thing by providing something else in return.[63]

BREACH AND 'STRICT' LIABILITY

Contractual liability is 'strict', Benson tells us, just in the sense that '*pacta sunt servanda*: contracts are to be kept'.[64] The wrong of contractual breach 'consists simply and solely in any unexcused departure from the performance owed'.[65] Benson proceeds to develop a rationale for this rule of contractual liability that is consonant with his proprietary model of contract. He pursues the analogy between a breach of contract and a deprivation of another's property.[66]

A breach of contract, Benson argues, is akin to the tort of conversion. The wrong of conversion 'consists in an assertion of exclusive control directly over

60 *JT* 182.
61 *JT* 181.
62 cf K. Marx, *Capital* (New York, NY: Vintage Books, Ben Fowkes tr, 1977) vol 1 pt 1 ch 2 ('Exchange'), cited in *JT* 177 n 24 ('[C]ommodities cannot go to market and make exchanges of their own account. We must, therefore, have recourse to their guardians, who are also their owners … [T]heir guardians must place themselves in relation to one another, as persons whose will resides in those objects, and must behave in such a way that each does not appropriate the commodity of the other, and part with his own, except by means of an act done by mutual consent. They must therefore, mutually recognise in each other the rights of private proprietors.')
63 Conversely, the assessment of exchange value arguably does not require one to recognise anyone else's ownership. Say I am shown a pile containing various goods, without being told who, if anyone, owns them, and asked to divide the goods into two piles of equal value. In deciding what to put in each pile I might assess the proper ratio of, say, the books to the glassware.
64 *JT* 245, citing the Second Restatement, ch 11, introductory note.
65 ibid.
66 An analogy suggested but not pursued by Fuller, see Fuller and Perdue, n 10 above, 59; *JT* 543 n 13.

another's property or possession'.[67] That act is wrongful in itself – regardless of whether it also causes further harm or consequential loss – and so the defendant can be held liable without further inquiry.[68] Thus, liability is 'strict'. Similarly, Benson claims, a breach of contract amounts to

> the defendant exercising factual control over that to which the plaintiff … is entitled in accordance with the contractual terms … [T]he defendant does this by withholding the promised performance from the plaintiff … [F]ailure to perform is thus conceptualised as an interference with the plaintiff's exclusive right to an asset … that has already been moved to her at formation …[69]

One might wonder why, on Benson's view, a breach of contract is merely analogous to conversion and does not literally give rise to that cause of action. In any event, further reflection reveals the respective causes of action diverge more than Benson lets on. Looking with unblinkered eyes at breach of contract cases, we will see no evidence that the defendant – by contrast to a defendant in a conversion case – must exercise control over some thing in order to be held liable. Often, there is nothing the contractual defendant could conceivably control at the moment of breach. I might breach a contract to supply you with new stock footage of snow-covered London streetscapes by a certain date because it does not snow. Even if there is some thing that could conceivably be controlled, the contractual defendant, unlike a conversion defendant, need not actually control it. To establish conversion, roughly speaking, the plaintiff must show that the defendant actually took possession of or used some object of his, and she may escape liability if her relevant conduct was non-volitional, or did not in fact cause the deprivation of the object. Whereas to establish a breach of, say, a contract for the sale of existing goods, the plaintiff need not allege the defendant actually controlled the goods. (Only that the promised delivery did not occur.) Nor can the defendant raise a defence just by showing that she did not control the goods. Indeed, it is no defence, in itself, that the defendant was non-volitional at the time of the breach – she may be liable though she was incapacitated or dead. Nor is it a defence that she did not cause the breach – she may be liable though it is caused by a third party or some other supervening event.[70]

If an examination of the law itself supplies no evidence that a contractual breach involves the defendant's controlling some thing, Benson's depiction must be driven by his broader theoretical commitments. In particular, by his desire to conceive of contractual breach on the model of a deprivation of property, so as to resolve Fuller's puzzle about why the law responds by awarding the

67 *JT* 249.

68 Though an inquiry into the reasonable foreseeability of her act's consequences may be relevant to the assessment of consequential damages. *JT* 248-249.

69 *JT* 251. Benson's view does not preclude contractual obligations to use, say, reasonable care. In contract law, reasonable care standards and the like are 'just ways of specifying the content of the particular performance that is owed'; the defendant remains 'strictly' liable for failing to provide that content. *JT* 245-247. Also, reasonableness assessments may be relevant to consequential damages. *JT* §8.2.

70 Of course the contract may sometimes (not always) be frustrated in these circumstances.

usual contractual remedies. Someone who approached contractual breach and liability without proprietary glasses on would not see these things as Benson does.

REMEDIES

Benson's final doctrinal topic is contract remedies. Rejecting Fuller's trinity of remedial interests – reliance, restitution, and expectation or performance – Benson maintains there is 'but one fundamental … interest, namely, the performance interest'.[71] He adopts the English view that reliance damages are really a performance-oriented remedy, designed to achieve rough justice where the plaintiff cannot prove how profitable the bargain would have been.[72] He takes a similar view of disgorgement.[73] Restitutionary awards, he assumes, are non-contractual.[74]

The remaining contract remedies, Benson contends, are oriented towards protecting the plaintiff's performance interest. The law aims primarily to give her *actual possession* of the promised subject-matter.[75] Specific performance achieves this by providing 'the very thing promised'.[76] So do expectation damages, when calculated to enable a covering purchase from a third party of the thing promised or a generic equivalent.[77] Sometimes, of course, neither the thing promised nor a generic equivalent is available. Yet it would be 'absurd and destructive' of contractual rights to award no remedy at all.[78] Hence expectation damages may alternatively provide the *value* of the thing promised.[79] Finally, consequential expectation damages may compensate for lost *use* of the contractual performance, such as the damages sought in *Hadley* v *Baxendale* for lost profits flowing from late delivery of the mill shaft used in the plaintiff's grain factory.[80]

The notion that contract remedies aim primarily to provide actual possession of the thing promised is prima facie at odds with the common law – which, notoriously, treats damages as the default and grants specific performance only where they are inadequate. However, Benson argues that damages are the so-called 'default' remedy, not because of any normative priority, but because they happen to be adequate in most cases.[81] They are 'adequate' when they are just as effective as specific performance at enabling the plaintiff to get the thing promised or an equivalent. In which case, for the plaintiff to insist on specific

71 *JT* 241.
72 *JT* 287-291.
73 *JT* 286-287.
74 See *JT* 264, 300-302, 314-316.
75 *JT* 268.
76 *ibid*.
77 *ibid*.
78 *JT* 273.
79 *JT* 273-274.
80 (1854) 9 Ex 341, 156 ER 145; *JT* 275. Benson gives an illuminating account of remoteness stressing the need to understand it transactionally or relationally.
81 *JT* 270.

performance would be an unnecessary, 'unjust imposition' on the defendant's freedom.[82]

Still, if contract damages aim to give the plaintiff actual possession of the thing promised, why need the plaintiff not spend them on acquiring actual possession? As one English authority tells us,

> in the normal case the court has no concern with the use to which a plaintiff puts an award of damages for a loss which has been established. Thus irreparable damage to an article as a result of a breach of contract will entitle the owner to recover the value of the article irrespective of whether he intends to replace it with a similar one or to spend the money on something else.[83]

The plaintiff who gets damages but declines to use them to procure alternative performance would seem, given Benson's view, to commit a sort of abuse of rights. Indeed, to impose unnecessarily and unjustly on the defendant's freedom.

Benson's strictures about contract remedies sometimes seem Procrustean. For instance, he stresses the distinction between basic expectation damages awards, which aim to restore actual *possession* of the promised performance, and consequential awards, which compensate for lost *use*. Admittedly this distinction is not unique to Benson,[84] and it may not be implausible to distinguish, in a case such as *Hadley* v *Baxendale*, between possession of the promised performance, 'timely delivery of the [mill] shaft', and the use of that performance, to enable the plaintiff's factory 'to resume production and thereby generate revenue'.[85] But in other cases the distinction is less natural. Consider a contract for a holiday or excursion that turns out to be disappointing or even harmful.[86] Perhaps a hotel room is filthy and unbearably noisy, or a white water rafting trip causes serious injury. Here is Benson:

> [B]reach may … interfere with performance uses that involve a psychic or emotional dimension (such as with a vacation package or insurance policy), thereby giving rise to consequential losses of an intangible nature … Note that the element of enjoyment is made possible by, but is conceptually (and legally) distinct from, obtaining the service itself (which comes under the plaintiff's performance interest in possession, and the loss of which is measured by the cost of obtaining a similar service in post-breach circumstances). Finally, there can be consequential loss where a plaintiff's intended use of a promised service or item involves her other assets in a way that exposes them to risks of damage if the defendant does not perform as

82 *JT* 271. Sometimes damages may be preferable even where they are not adequate, as in 'hardship' cases, where specific performance would impose a disproportionate burden on the defendant and the core of the plaintiff's performance interest can be protected by a damages award. *JT* 272–273.

83 *Ruxley Electronics & Construction* v *Forsyth* [1996] AC 344, 359 *per* Lord Jauncey. See further S. Rowan, 'Cost of Cure Damages and the Relevance of the Injured Promisee's Intention to Cure' [2017] CLJ 616.

84 For example M. Chen-Wishart, *Contract Law* (Oxford: OUP, 5th ed, 2015) 508 ('A contract can give rise to two quite separate expectations: that of receiving the promised performance and that of being able to put it to some particular use.')

85 *JT* 275.

86 For example *Jarvis* v *Swans Tours* [1973] 1 QB 233; *Jackson* v *Horizon Holidays* [1975] 1 WLR 1468; *Kent* v *Intasun Holidays* [1987] 2 FTLR 234.

> promised … [T]hese losses may also represent consequential damage because they are related to the plaintiff's performance interest in use.[87]

This seems somewhat divorced from the reality of the situation in these cases. A plaintiff who suffers a filthy, noisy hotel room is unlikely to complain that he was entitled to a holiday with certain specifications, and, distinctly, to use that holiday to enjoy himself. He would say he wanted an enjoyable holiday and would seek to be made good for a disappointing one. Likewise, the plaintiff injured by a rafting accident would not say he wanted a rafting trip and, distinctly, to use the trip in a way that involved his body (thereby exposing that asset to risk of damage). He wanted a safe rafting trip and seeks compensation for a harmful one.

More generally, contractual damages cases are on the face of it quite various, and reflecting upon them would not naturally lead one to adopt Benson's remedial schema – which characterises all damages as addressing the possession, use, or value of a thing promised. A family seeks redress for the inconvenience of having to walk extra miles home, on a wet night, after their train takes them to the wrong station.[88] An employee claims compensation for undeserved stigma and loss of livelihood when he is fired from a corrupt bank.[89] A mother is injured when she loses custody of her children because her lawyers fail to prevent their abduction to Tunisia.[90] A government seeks to claw back the profits of a secret service agent who has published details about his career.[91] And so on. The damages sought in these cases on the face of it concern, not the possession, value, or use of things, but a diverse range of ruptures or other failings in a variety of different relationships.

If Benson's remedial scheme cannot be read off the case law, there must be a theoretical impulse behind it. Indeed, since on Benson's proprietary model, contractual remedies address the wrongful deprivation of a person's thing, it is logical for him to suppose that any remedial award must address one of the ways in which a person may relate to a thing: by possessing it, enjoying its value, or using it.[92]

CONTRACT'S MORAL BASIS

In the book's latter stages Benson theoretically deepens his account, asking explicitly whether contract has a defensible moral basis – 'more exactly, whether it is consonant with a liberal conception of justice in which individuals count as free and equal persons and are accorded respect as such'.[93] Here Benson wants

87 *JT* 276.
88 *Hobbs* v *London & SW Ry* (1875) LR 10 QB 111.
89 *Malik* v *BCCI* [1998] 1 AC 20.
90 *Hamilton Jones* v *David & Snape* [2004] 1 All ER 657.
91 *A-G* v *Blake* [2001] 1 AC 268; cf *JT* 555 n 75.
92 cf G.W.F. Hegel, *Philosophy of Right* (Oxford: OUP, T.M. Knox tr, 1952) §53 (on property); *JT* 329-330.
93 *JT* 368.

to work out – by reflecting on the contractual doctrine – 'an appropriate conception of free and equal persons for contractual relations' in particular.[94] The conception Benson settles on is the individual person as an owner: someone independent, who respects other persons as equally independent, but who can control mere things.

First of all, contracting parties must, Benson believes, have 'a moral capacity to assert their sheer *independence* from their needs, preferences, purposes, and even their circumstances'.[95] The law does not force parties to pursue any particular purposes or values (other than those for which they contract).[96] Self-reflection should reveal that, while each of us has particular purposes, we could in principle give these up. That must be so since we are morally accountable and not mere brutes beholden to our inclinations.[97] Secondly, contracting parties must have a capacity for *reasonableness*: 'to recognise and to respect fair terms of interaction'.[98] In the present context they must be able to respect each other's independence.

However, these two moral capacities – to assert one's independence and respect others' – do not themselves get us to contract law. A contracting party could conceivably assert his independence, and have it respected, by *abandoning* any rightful claim to the thing transferred to him at contract formation.[99] Why, then, can he demand performance? Benson says we must postulate that each person has a power to embody himself in external things, including things acquired contractually.[100] '[I]t must be possible for me to express my inward power … *in this external existence*'.[101] This must be the case because 'nothing in the analysis of freedom as independence … precludes [it]' – no liberal moral principle can prevent persons controlling mere things – and the law cannot arbitrarily preclude what is morally permissible.[102]

Recall that Benson aims to develop a 'public basis of justification' for contract: to justify the institution to those who participate in it by elucidating ideas that are already present, if only latently, in our existing practices. One might worry that in articulating his moral basis for contract law Benson strays – despite his protestations to the contrary – too far from 'everyday' moral and legal experience.[103] Benson's conception of the individual person and her attendant moral powers has the strange and distinctive flavour of philosophy.

Benson also aims to develop a justification of contract suitable for *liberal* societies. This prompts a simple-minded objection: contract law predates liber-

94 *JT* 369.
95 *JT* 369 (emphasis added).
96 *JT* 366-368.
97 *JT* 369-370.
98 *JT* 369, 371, 379.
99 Likewise, in other areas of private law, someone could conceivably assert his independence by giving up his property, or even by withdrawing mentally from his own body. *JT* 374-375; Hegel, n 92 above, §48R ('I can withdraw into myself from my existence and make it external to me – I can keep my particular feelings outside myself and be free even if I am in chains.')
100 *JT* 373-379. cf Kant, n 29 above, [6:250-6:252] ('Postulate of practical reason with regard to rights').
101 *JT* 374 (emphasis in original).
102 *JT* 379.
103 *JT* 369-370.

alism.[104] While our contract law may have acquired liberal glosses in relatively recent times, focusing on these will obscure continuities with the law of medieval England, or for that matter ancient Rome or Athens. Those societies did not assume individual persons are free and equal – or, indeed, that the basic unit of analysis when we seek to justify moral, political, or legal obligations should be the *individual*.

Benson's account of contract's moral basis is of course not *purely* individualistic. He begins with the stunningly individualist claim that each person is radically independent – from everything in the world, including their circumstances and even any needs or purposes. But his next claim is more relational, asserting that each individual has the power to respect each other's independence. His final postulate, that each person has the power to control things, is again strongly individualistic (and proprietary). The result is a mixed account: one that is highly individualist but also strives to relate individuals to each other – albeit only insofar as they recognise each other's independence. We are left with what we might call a philosophy of relational individualism, or a 'relation of unrelatedness'.[105] This is not necessarily a criticism. Benson joins a long tradition of thinkers who have striven to reconcile a commitment to individualism with the relational or social aspects of human life. But we might wonder whether there could be some other, more straightforward understanding of contract.

CONTRACT IN CONTEXT

In the book's last chapter Benson turns away from contractual relationships themselves to address more 'systemic' or institutional issues: the interplay between contracts, markets, and distributive justice.[106]

At the heart of this discussion is Benson's conception of the market – which is not purely economic. He views markets as institutions of social justice that allow individuals to satisfy their needs in an acceptable way. Drawing on Weber, Benson defines a market as 'a social cooperative practice involving the systematically decentralised coordination of indefinitely many exchange transactions via competitively determined and publicly knowable prices'.[107] Markets are needed in a liberal society, Benson thinks, to provide a 'domain for [the] decentralised individual pursuit of particular interest and preferences on the basis of freedom of choice and association'.[108]

Markets as we know them could not exist without contract law. It decrees that exchanges must be consensual, and binds parties to their deals despite later changes in preferences. Contract law also decides who can participate in an ex-

104 cf J. Gardner, *From Personal Life to Private Law* (Oxford: OUP, 2018) 6, 196-197.
105 R. Jaeggi, *Critique of Forms of Life* (Cambridge, MA: Harvard UP, Ciaran Cronin tr, 2018) 196.
106 *JT* 28 and ch 12. This chapter also elaborates Benson's account of promissory morality, see n 11 above.
107 *JT* 413.
108 *JT* 452.

change, and what can be exchanged.[109] In these respects, markets 'presuppose[] … definite noneconomic norms and constraints' that arise out of contract law's internal morality.[110]

Markets also, Benson argues, generate the need for a system of distributive justice – thereby amounting to a 'pivotal middle term' that links distributive justice with contract law.[111] A liberal society's overall institutional scheme must fairly distribute benefits and burdens, so as to 'elicit the willing cooperation of all participants' in the scheme.[112] However, markets do not ensure a fair distribution – they countenance massive inequality of opportunity and even utter destitution (as does contract law). Therefore other institutions must take care of distributive justice, as part of an 'institutional division of labour'. The welfare state, in particular, should develop 'distributive principles that regulate the basic structure of society over time and … preserve background justice from one generation to the next'.[113] Meanwhile, contract law can focus on elaborating normative principles that 'apply directly to the separate and free transactions between individuals that take place within [the] basic structure'.[114] Hence contract law is essentially autonomous. However, it may incorporate principles of distributive justice at the margins – for instance when assessing the scope of restraint of trade clauses,[115] or interpreting offers made by offerors in the traditional common callings – 'inns, shops, carriers, ferries, and the like' – and by government agencies.[116]

Benson also accepts that market efficiency concerns may influence contract law. The proper functioning of markets is an aim all market actors ought to share – one that can be regarded as 'identically and reciprocally willed' by all.[117] To further this aim, we need clear rules to guide market actors *ex ante*. The general rules of contract law must be tolerably clear.[118] Moreover, we need specific rules for particular 'transaction types'. Thus, it makes sense for jurists to develop

> a sort of juridically *a priori* table of more specific forms of enforceable contractual relations that further determine the basic promise-for-consideration relation … [T]he consideration may consist of goods, services, opportunities, rights, liberties, or currency itself; it may be something generic or unique; and the kind of exclusive interest it involves may be anything from full and complete ownership to the most limited use or possession. These possibilities and distinctions yield diverse forms of transaction-types, each of which is *ex ante* knowably enforceable: … an exchange of things (for another specific thing, as in barter, or for currency) or of services (as with a contract for wages) either outright (e.g., in sale) or for a limited use and

109 *JT* 415-417.
110 *JT* 417 (emphasis removed).
111 *JT* 467; also 425, 428, 429.
112 *JT* 454.
113 *JT* 448.
114 *JT* 448.
115 *JT* 464-465.
116 *JT* 465-467 and n 165.
117 *JT* 426; 420-421.
118 *JT* 430-431.

> time (contract for rent); and the giving of security or pledge (which involves the cleavage between ownership and mere physical possession) …[119]

Judges can then 'breathe life' into these *a priori* juridical categories, by exercising what Llewellyn called 'situation sense':

> [S]ituation-sense sees in the particularities of interaction definite transaction-types comprised of paradigmatic facts that are specified and interconnected not in virtue of some logical necessity but because this is how the transactions function in and are shaped by social economic processes of market exchange. The different forms of transactions become routinised and culturally familiar to market participants … Thus, exchanges are between merchant and buyer, owner and hirer, master and servant, landlord and tenant, mortgagor and mortgagee, pledger and pledgee, carrier and customer, builder and owner, retailer and consumer, financial manager and client, and so on.[120]

Finally, the needs of the market also prompt the adoption of formal legal instruments that sit alongside contracts proper (ie promise-for-consideration relations). One such instrument, prominent in the minds of contract theorists, is the seal, which at least historically could render a promise enforceable without consideration.[121] That is justifiable, Benson claims, because consideration doctrine can be 'a source of uncertainty for market participants', such as those who seek to modify or vary an existing deal.[122] To address the interest in legal certainty 'that all transactors may identically share as participants in market relations', the law should recognise a purely formal, power-conferring device that market actors can use to bind themselves.[123] The seal aptly fulfils this function.[124]

Having shifted his focus from contractual relationships to more systemic or social institutions – markets and distributive justice – Benson must of course tell us what is systemically or socially desirable. Here he tends to make claims about what all individuals who participate in a given institution must 'identically' 'will'.[125] Consequently, this part of the book has a Kantian flavour that will not be to everyone's taste. Some may suspect the claims about everyone's identical will are largely a distraction. Granting, say, that the seal is a valuable form of legal commitment, or that a scheme of resource allocation may be unjust, does

119 *JT* 431-432 and nn 66-67, referencing 'the long and highly developed intellectual tradition of contract classification beginning with Thomas Aquinas, continuing with the natural law writers such as Domingo de Soto and Hugo Grotius, and culminating with the accounts by Kant and Hegel'.

120 *JT* 432-433, citing K, N. Llewellyn, *The Common Law Tradition* (Boston, MA: Little, Brown, 1960) 121-157 and T. Rakoff, 'The Implied Terms of Contracts: of "Default Rules" and "Situation-Sense" in J. Beatson and D. Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford: Clarendon, 1995). Benson notes that these transaction-types may influence the application of unconscionability and other unfairness doctrines.

121 Of course the seal has fallen from favour in many jurisdictions today. Benson also discusses negotiable instruments, and the rule of market overt.

122 *JT* 438.

123 *JT* 438.

124 *JT* 439.

125 *JT* 426, 429, 435, 454, 470.

it add anything to view these matters through the lens of the (universalised) individual will?

One might also wonder whether markets deserve the pivotal role Benson accords them, as the 'middle term' linking contract and distributive justice. Surely a society ought to ensure a fair distribution of benefits and burdens even if it has no markets, in Benson's sense – ie systems of meeting individual needs through repeated exchange transactions that are decentralised, competitive, and public. (Such a society's contractual exchanges might be largely private, uncompetitive, centralised, or occasional.) Non-market societies need distributive justice too.

The connection between markets and contractual transaction-types is also questionable. Benson presents contract law as specifying the various transaction-types to aid market certainty. But many of these have no obvious connection to markets. No doubt pledges, master-servant relationships, and landlord-tenant relationships, for example, must be to some extent 'routinised and culturally familiar' before they become legally conspicuous. However, none essentially depends on markets, in Benson's sense. All could and have existed in non-market feudal or serf societies. Hence it is doubtful these transaction-types can be fully explained as means of providing market guidance.

Finally, the relation between markets, contract law, and the seal is suspect. Benson presents the seal as a response to the uncertainty the consideration doctrine causes market actors. Yet, as he acknowledges, the seal predates consideration. Indeed, according to Benson it is 'a persisting customary practice from "time immemorial"'.[126] Consequently, he depicts the seal as an existing 'social-legal fact' which was then 'appropriated' by contract law to serve the new aim of facilitating market certainty.[127] He is content to lose the seal's original justification to the mists of time. It would surely be more satisfactory to understand the seal (and its relation to informal contracts) in a way that is, at least in principle, compatible with its entire history. In any event, the use of the seal is not limited to *market* transactions.[128] Arguably its paradigmatic use, at least for much of its history, has been to validate non-market transactions such as gifts between family members.

A CRITICAL RECONFIGURATION

In surveying some of the main topics of *Justice in Transactions* I have focused, perhaps a little ungratefully, on difficulties that arise because of Benson's proprietary and individualistic commitments, and his efforts to reconcile those with a contract's relational form. I have also questioned some of Benson's claims about contract law's social or systemic dimensions. I will now try to draw these points together. To do so, I will suggest we might resolve Benson's difficulties by retaining and developing his core insight that contracts are relationships, while

126 *JT* 436, citing R.C. Backus, 'The Origins and Use of Private Seals under the Common Law' (1917) 51 *American Law Review* 369, who contends that public seals arrived in England with the Normans, and private seals emerged in the years circa 1150-1250.

127 *JT* 436, 438.

128 cf *JT* 578 n84.

jettisoning his proprietary model and downplaying his individualism. As I hope will become clear, this approach refocuses Benson's account rather than rejecting it. I aim to provide a critical perspective that brings out (just some of) what is valuable in Benson's account, and I will rely throughout on his penetrating insights into contract law and theory.

As we have seen, Benson adopts his proprietary model so as to resolve Fuller's puzzle about why the law should enforce contracts by awarding specific performance or expectation damages. Benson contends that contract formation is akin to a property transfer, contractual breach like a deprivation of property, and contractual remedies methods of making good the deprivation. Benson then excavates the proprietary model's normative basis: the conception of the individual as an owner. This yields an extraordinarily deep and sophisticated theory of contract. But one that arguably does not fit all the law and contains some internal tensions.

It is noteworthy that, as Benson observes, the proprietary model he adopts in order to resolve Fuller's puzzle also partly motivates Fuller's puzzlement in the first place.[129] (Another motivation is Fuller's observation that other undertakings, such as gratuitous promises, do not attract similar legal enforcement.) Fuller assumes it is obvious the law should intervene, by awarding compensatory remedies, where one person takes or damages another's property. He becomes puzzled precisely because a contractual breach, unlike a proprietary wrong, does not seem to deprive the victim of any thing she already has.[130] Fuller even considers resolving his own puzzle by developing a proprietary understanding of contract – but rejects this as unrealistic.[131] By contrast, Benson doubles down on the proprietary model, constructing a monumental theory of contract based upon it and carefully elucidating its individualistic foundations.

All this might prompt us to wonder whether there is, at least in the context of contract law, an alternative to the proprietary model of legal enforcement, with its associated individualistic commitments, that preoccupies both Fuller and Benson. I suggest one alternative might be to focus on the seemingly simple point – on which Benson also keeps an eye throughout *Justice in Transactions* – that contracts are relationships. Perhaps the legal significance of these relationships is not to be brought out by conceiving of them as akin to proprietary transfers, or by connecting them to a normative conception of the individual.[132]

129 *JT* 5-8, 301.

130 n 10 above, 53.

131 *ibid*, 59-60. Fuller, in a sort of Realist mode, argues it is question-begging to talk of a right to contractual performance, because that right is surely created by the law rather than a recognition of any property-like holding that exists independently of the law. Whereas Benson, who has more idealist inclinations, is happy to talk of a contractual right arising as a result of a property-like transfer which occurs in the 'pure realm of ideation'. These quite different reactions are prompted by the same thought, that contract law might in principle be justified on a proprietary model.

132 Note that Benson believes the whole of private law is based on what I am calling the proprietary model. It informs his conceptions of various fundamental concepts such as misfeasance, compensation, and ownership. For example *JT* 7, 255-256, 325-326; see further P. Benson, 'Misfeasance as an Organizing Idea in Private Law' (2010) 60 UTLJ 231. To persuade Benson I would have to dislodge this model at least from contract law, if not also from other areas of private law.

Rather, some relationships might be worthy of legal enforcement just because of the kinds of relationship they are.

To begin a necessarily cursory essay of this approach, it will help to call to mind some of the particular relationships in which laws of contract tend to take an interest.[133] In other words, we can begin with the 'routinised and culturally familiar' 'transaction types' that *Justice in Transactions* considers towards the end. Such as the relationship between a seller and purchaser of goods, a landlord and tenant, master and servant, or pledgor and pledgee. (These and other transaction types tend to be neglected in contemporary contract theory – which focuses on the law's 'general part'. One major exception is Hanoch Dagan and Michael Heller's recent work.)[134] I suggest we need not, like Benson, view these various transaction types as the product of a sort of juridically *a priori* classification process, which further determines the concepts inherent in the promise-for-consideration relation, nor as fixed by the law to provide *ex ante* guidance for market actors. Instead, I suggest, these transaction types are the basic stuff of contract law: important relationships worthy of being legally upheld.

Why does it make sense for the common law uphold these and other particular substantive relationships? To answer this question, we might consider each of the particular relationships in more detail, giving an interpretive account of each that brings out its importance and value. Here it might help to situate each relationship within the context of our broader way of life, showing how it is 'part and parcel of an enormous amount of human activity and hence of human good'.[135] However, we need not portray any given relationship as instrumental – as a means to the realisation of some independent end. Instead, we might bring out each contractual relationship's importance just by reminding ourselves of the kind of relationship it is. Compare the way one might try to bring out the importance of a quite different kind of relationship, such as friendship.[136]

To illustrate, consider the pledge. Why might one think the law should uphold the pledgor-pledgee relationship? Not least, because by participating in this relationship one person can take possession of a valuable item that belongs to another, and have recourse to it, for example by selling it, if she does not receive some other satisfaction that is due.[137] It is often useful for both parties to participate in such a transaction, since each can thereby obtain benefits that might otherwise be unavailable to her. This is connected with some familiar facts about our broader form of life: people often want to extend credit, or have to incur obligations, to each other; it is not always easy to assess another person's

133 cf Aristotle, n 1 above, 1131a: 'such transactions as sale, purchase, usury, pledging, lending, depositing, letting'. See further D. Phillips, *The Law of Ancient Athens* (Ann Arbor, MI: U Michigan Press, 2013) ch 10.

134 H. Dagan and M. Heller, *The Choice Theory of Contracts* (Cambridge: CUP, 2017). See too *JT* 576-577 n66. Dagan and Heller's avowedly liberal theory claims that a diverse range of transaction types promotes individual autonomy or self-authorship. Hence they espouse another version of the kind of approach I am trying to downplay above.

135 G.E.M. Anscombe, 'On Promising and its Justice, and Whether it Needs Be Respected *In Foro Interno*' (1969) 3 *Crítica* 61, 74.

136 cf Aristotle, n 1 above, books VIII-IX.

137 This description is meant to be broad enough to cover historical forms of the pledge alleged by J.H. Wigmore, 'The Pledge-Idea' (I) (1897) 10 Harv L Rev 321.

creditworthiness or trustworthiness; it may be relatively simple to value, say, a physical item, and be confident of one's ability to sell it; and so on.

Of course, not all contractual relationships' significance lies in their substance – the type of good, service, situation, etc they involve. The significance of some relationships lies more in their form. They attract legal attention because they involve a certain ceremony. Such as the ceremony, prominent in the minds of contract theorists, of executing a deed using a seal. At least at one point in the common law's history, this ceremony consisted of a written document being signed, sealed with an imprint of wax or clay, and delivered to another person.[138] We need not, I suggest, view this ceremony as an unexplained socio-legal fact from time immemorial, later appropriated by the common law to serve the new purpose of facilitating market certainty. Instead we might view a transaction consecrated in this manner as the basic stuff of contract law: a particular kind of relationship worthy of being legally upheld. It properly attracts the law's attention not least because it tends to be especially solemn and significant – people do not generally bother with an elaborate ceremony if their relationship is merely fleeting or trifling.

Now, systems of contract law tend to feel practical and intellectual pressure to go beyond a mere list of various substantive or ceremonial relationships the law will uphold, and to articulate a more general approach: to supply a general principle of demarcation that distinguishes contractual relationships from other undertakings that are not worthy of the same legal treatment.[139] The common law, notoriously, decided to require what Benson helpfully calls the 'promise-for-consideration relation'. Or more simply, an *exchange* relation.[140] I suggest this kind of relation is not necessarily *more* relational than non-exchange relations, such as gratuitous promises. Nor is it the most natural or simple way for two parties to represent a transfer in a wholly ideal manner (without any actual movement of things). Exchange is merely a quite general kind of relation the common law has decided worthy of enforcement. This approach should not be wholly surprising given the character of the society that developed it: a burgeoning mercantile civilisation, or more pejoratively, a nation of shopkeepers.

The exchange criterion is also understandable because it denies enforcement to gratuitous promises. This is appropriate, I suggest, not because gratuitous promises fail to amount to property-like transfers whereby the parties mutually recognise each other as acquiring ownership of things, but just because – as Benson also observes – gratuitous promises tend to be relationships of trust and respect in which each side depends on the other's moral integrity. Relationships of that sort do not sit well with the cold, public, and potentially severe processes of our civil courts.

138 Benson (like many other scholars) downplays the significance of delivery and characterises sealed promises as unilateral, rather than relational, commitments. *JT* 46, 436. This is an important issue I cannot address here.

139 D. Phillips, 'Hypereides 3 and the Athenian Law of Contracts' (2009) 139 Trans Am Philol Assoc 89.

140 J. Lewinsohn, 'Paid on Both Sides' (2020) 129 Yale LJ 690, identifies important complexities here. Benson emphasises that a contractual exchange need not be economically significant, *JT* 45.

Still, we should not overpraise the common law's focus on exchange relationships. That would not be true to the problematic status of the consideration doctrine in the law itself. Ever since the doctrine began to take something like its modern form, it has been subject to sustained criticism and riddled with exceptions. The requirement of a genuine exchange has been watered down, including through the notion that courts will assess the consideration's 'sufficiency' but not its 'adequacy'. Some jurisdictions have added a companion doctrine of 'intention to create legal relations' to weed out apparent exchanges that do not truly warrant legal enforcement – such as exchanges between family members, friends, and other intimates, which tend to share many features with gratuitous promises.

Consideration is also supplemented – as part of a doctrinal division of labour – by other doctrines that ensure the law does not uphold certain kinds of *unfair* exchange relationship. Take unconscionability. Its contours and even existence, at least in England, are contested. Yet some cases seem to cry out for the application of such a doctrine – for instance, a salvage contract in which a ship in distress agrees to an exorbitant price.[141] Whether or not this is a meaningful class of transaction from the standpoint of social distributive justice, a court is unlikely to uphold it simply because it is an unjust kind of relationship. (By contrast, a charitable café hiring, for instance, will likely be upheld because it is not an objectionable kind of relationship.)[142] The relational unfairness in the salvage case has both a 'procedural' aspect – in formation, the salvor leverages the salvee's predicament – and a 'substantive' aspect – the salvor extracts an exorbitant price from the salvee. Both of these aspects bear on the character of the parties' relationship. There is no need to look for any normative connection between the respective things that the parties exchange – as a commodity fetishist might suppose. Nor need we invoke Benson's presumption that a contracting party is a separate and independent person who jealously guards his purchasing power.

A breach of contract, on the view I am essaying, is not wrongful because the defendant exercises control over some thing to which the plaintiff is entitled. In this respect, it differs from the tort of conversion. A contractual breach is wrongful just because the parties must respect the contours of their contractual relationship – *pacta sunt servanda* – and the defendant has failed to do so. Hence the defendant can be held liable without further inquiry – liability is, in this sense, 'strict'.

Relatedly, remedies for contractual breach need not aim to restore the possession, value, or use of some thing. Nor need they aim, primarily, to confer actual possession of a thing. Contractual remedies involve a range of different techniques for addressing diverse ruptures and other failings in a variety of relationships. Their primary aim is to vindicate the relationship.

Finally, offer and acceptance doctrine is theoretically significant because, as Benson sees, it ensures the contracting parties relate to each other in a ro-

141 Depending on the circumstances this might also amount to duress.

142 Benson hints at something like this approach when he suggests that unconscionability's function is to ensure the 'transactional integrity' of different categories of transaction – though he focuses on just two categories, exchange and gift, *JT* 183.

bustly bilateral way. However, we create needless difficulties if we approach the doctrine, not from an irreducibly relational standpoint, but by considering the standpoint of each individual party in contract formation. This may lead us to suppose that each individual must know she is linking up with the other at the moment she assents – which may in turn lead us to the uncompromising view that the assents cannot be simultaneous. Instead, we might remind ourselves that the point of offer and acceptance doctrine is just to establish that there is a relationship in which two (or more) persons are participating – such as a sale of goods, a pledge, or a marriage. Sometimes it may be reasonable to conclude that the parties are participating in such a relationship when they assent simultaneously. Whether this is so will of course depend on the context and history of their transaction.

In analysing contract formation, an 'objective' test is appropriate because, as Benson explains, it refers to both sides in their mutual relation, supplying a transactional or relational meaning for their expressions. But we need not justify this test by shuttling back and forth between the standpoints of each of the individual parties, considering what each can expect of the other. We can think of the objective test as establishing, for any given communication, a single meaning that embraces both parties, so that both can be viewed as participating in the same understanding.

Thus, a non-proprietary, essentially non-individualistic view of contracts as relationships may dissipate some of the difficulties Benson faces. At the same time, this view of course generates other difficulties. As just one salient example: it is not immediately clear how it can be reconciled with *liberalism* – the notion that the basic unit of analysis in justifying moral, political, or legal obligations should be the individual person, conceived as free and equal. A proponent of the relational view might accept that the law has acquired liberal or individualist glosses in relatively recent times (especially in its 'general part'). It would be wiser to downplay the individualist aspect of Benson's theory than to jettison it altogether. Still, if contract law's individualistic properties are less fundamental than its relational character, it is unclear whether this area of law can be fully justified in liberal terms. If we are after such a justification, it may be that only something like Benson's approach holds out hope – we must return to *Justice in Transactions*.

Certainly, if one seeks a detailed, systematic, deeply elaborated account of the common law of contract from a liberal theoretical perspective, *Justice in Transactions* has no rival. It deserves to sit alongside the books of other great thinkers in the tradition, such as Grotius and Hegel, who took contract law seriously, and who tried to justify it for their own times, in light of their own philosophical concerns, thereby yielding insights for any future readers willing to engage with them.