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CONTRACT AS A TRANSFER OF OWNERSHIP

PETER BENSON*

All agree that contracts are, and must be, voluntary transactions, in this way differing from transactions that come under the law of tort or unjust enrichment. Unless an agreement is voluntary on both sides, it cannot be binding and so cannot be a contract at all. Voluntary interaction is the essential basis of obligation in contract. Understanding the voluntary character of contract would therefore seem crucial to clarifying its moral basis as well as its distinctive place within private law. But what makes an agreement voluntary?

Most would root the voluntariness of contract in the fact that it arises through the parties' *consent*. Contract is essentially consensual and in virtue of this it is voluntary. So, for example, Samuel Pufendorf begins his classic discussion *On the Consent Required in Promises and Pacts* with the proposition, which he presents as self-evident, that

no more pertinent reason can be advanced, whereby a man can be prevented from complaining hereafter of having to carry such a burden [of the necessity of doing something] than that he agreed to it of his own accord, and sought on his own judgement what he had full power to refuse.¹

The question is what, if any, conception of consent can function as the *essential* basis of contractual obligation. I have put the question this way because what we are seeking is a unified and coherent moral basis for contract. It is the central question that I address.

The legal point of view itself supposes that a certain sort of consent is pertinent to contract law. We begin with this, because our aim is to elucidate and to justify a conception of consent that is at

* I would like to thank my Research Assistant Fredrick Schumann for helpful comments and suggestions.

1. 2 SAMUEL PUFENDORF, *ON THE LAW OF NATURE AND NATIONS* 402 (C.H. Oldfather & W.A. Oldfather trans., Clarendon Press 1934) (1688) (footnote omitted).

least implicit in the widely recognized principles of contract law and so part of our public reason.

Now the sort of consent that is supposed by contract law is one that is necessary and sufficient for contract formation and therefore for the establishment of a relation of right and duty between the parties at the moment of agreement. The relation of right and duty arises through the parties' mutual expressions of assent, prior to and independent of the moment of performance. From a legal point of view, no new rights or duties arise between the parties after formation, whether by performance or by breach. The contractual rights and duties between the parties are completely specified and determined at formation. Performance adds nothing new but is just the fulfillment of the rights and duties established at contract formation. More precisely, performance respects those rights whereas breach injures them. The character and shape of these rights is reflected in the fact that they are specified only as between the parties, not against others who are strangers to the contract, and that their breach is remedied through damages or specific performance, both of which aim to put the plaintiff in the position he or she would have been in had the defendant performed as promised. The law supposes that these remedies are necessary and sufficient to enforce, by way of compensation, the rights and duties that are brought into existence by the parties' consents at contract formation. All this seems relatively clear and uncontroversial. To see that it is not, I turn to the celebrated essay by Fuller and Perdue, *The Reliance Interest in Contract Damages*.²

I. THE FULLER AND PERDUE CHALLENGE

In their article, Fuller and Perdue begin with the long-established legal principle that the normal remedy for breach of contract is either expectation damages or specific performance and that in giving such remedy, the law aims to put the plaintiff in the position he or she would have been in had the contract been performed.³

2. The essay was published in two parts. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373 (1937). All citations in this Essay to "Fuller & Perdue" refer to the first part of their work.

3. Fuller & Perdue, *supra* note 2, at 52 n.1 (quoting 3 WILLISTON, CONTRACTS § 1338

The law takes this “expectation” principle to be a principle of *compensation* and, as such, to be a just and ruling principle.⁴ This is precisely what Fuller and Perdue challenge. They write that contract remedies give a plaintiff “something he never had.”⁵ “This,” they point out, “seems on the face of things a queer kind of ‘compensation.’”⁶ In giving such remedies, the law does not “heal a disturbed status quo” but instead brings into being “a new situation” and, in doing so, the law passes “from the realm of corrective justice to that of distributive justice.”⁷

Their challenge supposes, then, the generally accepted idea of compensation in private law and urges that the central and distinctive remedies of contract law do not fit with this idea, contrary to the way the law presents them. What is this idea of compensation?

Briefly, it supposes, at step one, an initial baseline that represents a legally protected interest which the plaintiff has exclusive as against the defendant, prior to the defendant’s wrong. The plaintiff must *have* something as a matter of exclusive right which the defendant is not permitted to injure. Absent this interest, any impact which the defendant’s conduct may have on the plaintiff’s well-being will be no more than *damnum absque injuria*. Supposing now, at step two, the defendant does something that is incompatible with the plaintiff’s protected interest—the law will attempt by way of remedy, at step three, to reinstate the plaintiff in the position he or she would have been had the defendant respected his right. Damages are given, not to increase the plaintiff’s well-being which has been diminished, but to cancel the wrong by repairing the loss that results from it. So far as money damages can do, the plaintiff is put into the position he or she would have been had there been no wrong. This position is the initial baseline. It is only if the rationalization of the remedy begins and ends with this baseline of protected interest that it can count as compensatory. In the particular case of

(1920)).

4. A typical statement of this view is the classic version by Lord Atkinson in *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301, 307 (P.C. 1910) (appeal taken from Que.). Fuller and Perdue cite Williston’s statement of the principle. Fuller & Perdue, *supra* note 2, at 52.

5. Fuller & Perdue, *supra* note 2, at 53.

6. *Id.*

7. *Id.* at 56.

contract remedies, if expectation damages and specific performance are to qualify as compensatory, it must be possible to view them as reinstating plaintiffs in something which is their protected interest and which they already have prior to breach. But this is exactly what Fuller and Perdue deny.

Fuller and Perdue then go on to consider a number of possible non-compensatory justifications for the expectation rule and conclude that the most plausible basis is a rationale that views these remedies as curing and preventing a plaintiff's reliance losses as well as facilitating general reliance on business agreements.⁸ In this Essay, I do not wish to discuss their suggested rationale.⁹ Instead, I want to make more explicit their reason for holding that the expectation remedy, whether damages or specific performance, *cannot* be understood as compensation. This will enable us to see more clearly how contract formation must be conceived if, contra Fuller and Perdue, the legal point of view is to be plausible and further, what kind of consent might be the necessary and sufficient basis of contractual obligation.

The premise for their conclusion, although implicit, seems clear. Fuller and Perdue presuppose a conception of promising in which the making of a promise does not, in and of itself, give the promisee anything that, as a matter of rights and prior to performance, can count as a protected interest as against the promisor. The assumption here is that it is *only* if and when performance takes place that the promisee acquires anything that qualifies as a legally protected interest. Thus a breach of contract cannot, strictly speaking, count as an injury that interferes with, or otherwise deprives the promisee of, something he acquires at contract formation.¹⁰ Nothing is acquired at contract formation. At the start, certainly the promisor

8. *Id.* at 57-66.

9. I have discussed the Fuller and Perdue article in more detail in previous articles. Most recently, see Peter Benson, *Contract*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 24, 25-29 (Dennis Patterson ed., 1996); Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 118, 119-22 (Peter Benson ed., 2001) [hereinafter Benson, *The Unity of Contract Law*]; and Peter Benson, *The Expectation and Reliance Interests in Contract Theory: A Reply to Fuller and Perdue*, *ISSUES LEGAL SCHOLARSHIP*, June 2001, <http://www.bepress.com/ils/iss1/art5>.

10. This view is clearly stated by two continental writers, Emile Durkheim and Pierre de Tourtoulon, in Fuller & Perdue, *supra* note 2, at 56 n.7. Fuller and Perdue cite Durkheim and Tourtoulon's views in support of their argument that the expectation remedy is not compensatory in character.

may have a property right in, say, the horse that he or she agrees to sell to the promisee. The promisor's protected interest in the horse ends or is limited only when he or she delivers it into the promisee's possession, whereupon it is now the promisee who has the property right in it as against (in principle) anyone else. What Fuller and Perdue deny is that the promise as such gives the promisee any legal entitlement whatsoever. There is no specifically contractual entitlement.

On this view, property and promises are radically distinguished. Only property intrinsically and necessarily entails the idea of exclusive rights as against others. Property, but not promise, expresses a right of ownership in the large sense of *having something of one's own from which one is entitled by rights to exclude others*. If, according to Fuller and Perdue, *certain* promises should be enforced, it is not because they are understood as conferring ownership or creating a relation of exclusive right as between the parties, but simply and solely because enforcement is desirable on the basis of policy considerations. They deny that promises, as such, have juridical significance.¹¹

This view of promises is in sharp contrast with the legal standpoint. The law presents the kind of rights conferred by enforceable promises (rights in personam), no less than proprietary rights in rem, as being exclusive as against another (the promisor) with respect to something in which the promisee can have a legally protected interest. Contract rights are clearly viewed as involving ownership, understood in the large sense. Moreover, this protected interest is directly established in and by the parties' mutually related expressions of assent. The source of right here is the parties' transaction itself. The legal principles governing the requisite assents—the doctrines of offer and acceptance as well as consideration—do not single out enforceable promises on the basis of their substantive content, purposes, or economic significance. To the contrary, the principles of formation are content-neutral and indifferent to such considerations. A promise of something in return for another's refraining from an activity he or she is legally permitted to do, as in the famous case of *Hamer v. Sidway*,¹² has the

11. See *id.* at 56-57.

12. 27 N.E. 256 (N.Y. 1891) (involving an uncle's promise to his nephew for a payment of

same legal standing and significance as the most sophisticated and commercially important business deal.

Fuller and Perdue's denial of the juridical significance of promises is troubling because it means that the very basis of the most distinctive feature of contract law is radically misconceived, despite the fact that the compensatory character of the expectation remedy has long been settled and accepted in modern systems of contract law, both common law and civil law. It becomes questionable when we notice that, far from arguing for, let alone showing the necessity of, their view, Fuller and Perdue simply assume it. Even more interestingly, their denial of a juridical character to promises undermines their central claim that reliance is, and should be, the basis of contractual liability. Let me explain.

Fuller and Perdue hold that a promise, without anything more, creates merely a psychological expectation of performance which may in fact be fulfilled or disappointed.¹³ The expectation, and therefore its satisfaction or disappointment, does not as such give rise to any claims of rights between the parties. For breach of promise to have juridical consequences, something more must be present. According to Fuller and Perdue, this further necessary factor is reasonable reliance by the promisee upon the promise.¹⁴ Where a promisee does rely and, upon breach, sustains loss as a result of such reliance, they contend that damages for such reliance losses, unlike expectation losses, *are* compensatory.¹⁵ However, given the contrast that Fuller and Perdue draw between property and promises, this is not self-evident even in their own terms.

To explain, there are two basic ways in which a promisee may rely to his detriment on another's promise. Both represent a situation in which the promisee has changed position in reliance on the promise. In the first, the promisee expends some resource or incurs a potential burden or liability in reliance on the promise. But for the promise, the promisee would not have done so. If the promisor fails to perform, the expenditure may be lost or wasted and the burden or liability may materialize, causing the promisee loss.

\$5000 in exchange for the nephew's refraining from using alcohol and tobacco, swearing, or gambling until age twenty-one).

13. Fuller & Perdue, *supra* note 2, at 57-58.

14. *Id.* at 56.

15. *Id.*

A second way in which a promisee can change position in reliance on another's promise is by foregoing a beneficial opportunity that is available to him or her and which he or she would take but for the promise. If the promisor does not perform, the promisee may not be able to go back to his or her pre-reliance situation because the opportunity is no longer available, or available only at a greater cost. This would be his reliance loss.

Notice that in the first case, a promisee *no longer* has the resource which has been expended in reliance on the other party's promise; in the second situation, the promisee *never* obtains the beneficial opportunity that, otherwise, he or she would have taken in the absence of the promise. In other words, at the time the promisor breaches, the promisee either no longer has or does not yet have any present proprietary interest that can be injured by the promisor. Moreover, there is nothing which the promisee physically possesses or has a present right to possess. However, by the very objection which Fuller and Perdue raise against the supposed compensatory character of the expectation remedy, the reliance remedy cannot itself count as compensatory unless it repairs injury to something which comes under the promisee's exclusive right as against the promisor. But if the promisee does not have a proprietary interest, it is by no means clear, on their argument, how the promisee can have this right.

To have this right, the plaintiff would have to argue something like the following:¹⁶ because the defendant, by his or her promise, induces the plaintiff to give up or not obtain something in which there can be a protected interest, fairness and reasonableness require that the defendant be estopped from denying the plaintiff's claim on the ground that he or she lacks a protected interest. In light of the defendant's promise and the plaintiff's reasonable reliance thereon, the plaintiff's pre-reliance position represents a protected baseline which the defendant must not injure through his or her breach of promise. The plaintiff's pre-reliance position

16. I have discussed this in Peter Benson, *The Basis for Excluding Liability for Economic Loss in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 450-54 (David G. Owen ed., 1995) [hereinafter Benson, *The Basis for Excluding Liability*], and most recently in Peter Benson, *Should White v. Jones Represent Canadian Law: A Return to First Principles*, in EMERGING ISSUES IN TORT LAW (J. Neyers et al. eds., forthcoming 2007) [hereinafter Benson, *Should White v. Jones Represent Canadian Law*].

constitutes a protected baseline *only* as between the parties and as a fair implication of their interaction. Notice that here the promise has juridical consequences as part of a reliance analysis and that, once again as part of this analysis, the plaintiff asserts a protected interest which is not proprietary (in rem) but which nevertheless entails an exclusive right as against the defendant with respect to a thing (the pre-reliance asset). There is a non-proprietary ownership interest that arises through a transaction constituted by a promise on one side and reliance on the other side.

We see, then, that the problem of entitlement that Fuller and Perdue raise against the expectation remedy has wider implications for their own view. There are two fundamental questions: First, can there be exclusive rights which, although not proprietary (in rem), are nevertheless *ownership rights* because they are exclusive against another with respect to the control of a thing? Second, is it possible for such non-proprietary entitlements to arise *through interaction between the parties*? The compensatory character of reliance damages, no less than expectation damages, rests on explaining how both questions may be answered in the affirmative. In the particular case of expectation damages, the challenge is to see whether there can be such entitlements at the moment of contract formation and therefore fully established solely through the parties' expressions of mutual assent even in the absence of actual reliance. The consent that is the moral basis of contract would be that which is necessary and sufficient to establish such entitlements. To explain this is the most important task of the theory of contract.

Before attempting to do this in Part III, I want first to consider, even if briefly, three instructive contemporary efforts to meet the Fuller and Perdue challenge and to vindicate the expectation interest. Each of these, I argue, fails because it does not specify a conception of entitlement for contract that is suitably transactional and complete at the moment of the parties' consents. Understanding their deficiencies will clarify what is needed to answer Fuller and Perdue and thereby to provide a satisfactory theoretical defense of the possibility of contract.

II. THREE ANSWERS TO FULLER AND PERDUE: THE THEORIES OF FRIED, SCANLON, AND GORDLEY

A. Fried

I begin with Charles Fried's account of contract as promise.¹⁷ Contractual obligation, he argues, rests on the duty to keep one's promises and the latter is explained in two steps.¹⁸ The first establishes the *rationality* of a general convention of promising that is known by both promisors and promisees to be a means of communicating present commitment to future performances. This convention is rational in the sense that it is wanted by and is useful to individuals in the pursuit of their various ends. Whether as an expression of generosity or in order to obtain reciprocal benefits, people wish to be able to give and to obtain in their mutual relations a secure moral basis with regard to expectations of future conduct. Otherwise, the range and scope of individual purposes are severely limited. By invoking the convention, people know that they are communicating to others—and they know that the others understand this as well—a commitment to do something that would otherwise have been optional. But what if a promisor, who has invoked the convention by making a promise to another, comes to regret his or her decision before performing? Is there a moral basis distinct from detrimental reliance for saying that the promisor would wrong the promisee if he or she did not perform?

Fried answers that the mere fact that one has used the convention and made a promise does not explain why it is wrong to break that promise. The fact that I invoke the convention because I *want* to bind myself so that another might expect a future performance does not, by itself, show that I am now *obligated* to perform my promise if to do so would be inconvenient or costly. Fried raises this problem because, in his view, one must explain how even

17. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981). I have discussed Fried's theory in greater detail in Peter Benson, *Abstract Right and the Possibility of a Non-distributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1095-117 (1989), and in Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 OSGOODE HALL L.J. 273, 288-93 (1995) [hereinafter Benson, *Public Basis of Justification*].

18. The following is a summary of his view as set out in Chapter Two of FRIED, *supra* note 17, 7-27.

the intentional creation of expectations in another via a general convention can bind the person to perform. Why does the promisor *owe the promisee* this performance? Fried's answer is that there is a duty to perform because, by invoking the general convention of promising, a promisor has invited the promisee to trust and to make himself or herself vulnerable. Breach of promise is an abuse of this trust.

Fried does not elaborate what he means by trust or by vulnerability, although by his own theoretical claims he must distinguish it from detrimental reliance in the strict sense. Clearly, the ordinary idea of trust can mean that the promisee trusts the promisor's moral integrity and fidelity to perform as promised simply because this is what the promisor has committed himself or herself to do. Pufendorf, whom Fried cites as an early defender of the promise principle, gives an example of promising when trust and vulnerability are expressly invoked by the promisor and appear most clearly: "I have made up my mind in all seriousness to do this or that for you, and I hope that you will take my word for it."¹⁹ In this example, we see that the commitment is established by the promisor's act alone, without the joint participation of the promisee. The promise is made to or for, but not with, the promisee. The promisee need not *do* anything to bring the commitment into existence. Further, by making the promise, the promisor does not, then and there, transfer anything to the promisee which the latter can assert as his or her own against the promisor *prior* to performance. To the contrary, the promisee will only acquire the thing promised *if* and *when* performance takes place. Until that moment, the promisee can merely hope that he or she will receive it, trusting the promisor's honesty and his or her fidelity to his or her word. It is precisely when the commitment arises through the promisor's decision alone and the promisee has *not* already given the promisee anything prior to performance that trust and vulnerability are present most clearly and purely.

In Kantian terms, all that Fried has shown is that the promisor's duty to perform is a duty of virtue, not a juridical obligation of right. If the promisor fails to perform as promised, he or she may have abused the promisee's trust and this is certainly something

19. 2 PUFENDORF, *supra* note 1, at 394.

blameworthy. But, in the absence of detrimental reliance, Fried's argument does not show that the promisor has thereby injured a legally protected interest belonging to the promisee. Trust and vulnerability, we have seen, can be generated without presupposing that the promise gives the promisee, prior to performance, anything that can count as his or her own as against the promisor. These grounds of obligation need not arise through the promise vesting the promisee with a legally protected interest at the moment the promise is made. Fried writes that "if I make a promise to you, I should do as I promise; and if I fail to keep my promise, it is fair that I should be made to hand over the equivalent of the promised performance."²⁰ But, unless the moral grounds for the obligation suppose that the promise *does* give the promisee a legally protected interest prior to performance, the conclusion that the promisor should, absent detrimental reliance, be under any legal liability for damages, let alone for expectation damages, is unsupported. There is no basis for holding that nonperformance *injures* anything that belongs to the promisee and therefore no basis for concluding that the promisor should be made to hand over the equivalent of the promised performance as a matter of compensation. The argument wholly fails to meet the Fuller and Perdue objection.

B. Scanlon

In his recent discussion of promises and contracts,²¹ T.M. Scanlon suggests a different answer to the Fuller and Perdue objection, which revises Fried's approach in at least three important respects. First, Scanlon argues that the obligation to perform one's promises need not depend upon supposing the prior existence of a general convention of promising or indeed of any convention at all.²² Rather, it requires only that there be a moral principle that applies directly to a two-party relation and that articulates a reasonable basis upon which, as between them, one party should perform as promised.²³ Scanlon's account—this is the second point of difference—is thus

20. FRIED, *supra* note 17, at 17.

21. T.M. Scanlon, *Promises and Contracts*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS*, *supra* note 9, at 86.

22. *Id.* at 98-99.

23. *See id.* at 88-99.

geared to illuminate the direct moral relation between two persons, where that relation is brought about by the giving and receiving of a certain kind of moral assurance as to future performance. The duty to perform is *owed* to another and must be explained as such. Third, Scanlon distinguishes between promises and legally binding contracts and presents a moral basis for the enforceability of contracts that is parallel to, but nonetheless distinct from, the moral argument for the duty to keep one's promises.²⁴ I wish to focus on his discussion of the enforceability of contracts and see whether it satisfactorily answers the Fuller and Perdue challenge.

Central to Scanlon's explanation of contracts as well as promises is the idea of assurance.²⁵ The notion of assurance is simply that, apart from a concern about the consequences of relying to one's detriment upon another's word, one may want the other to do as promised, in and of itself. One wants, in other words, to be assured that the other person will do a certain thing which the latter is otherwise morally free to do or not to do. It will not be enough for the other to give timely warning of a change of mind before there has been actual reliance. One *wants actual performance* unless one releases the other from his or her obligation to perform. Promising is one way of providing this assurance. Not only promisees who receive such assurances, but also promisors who give them, can have an interest in being able to do so. In addition, given their interests in providing and receiving assurances, both promisors and promisees may wish to have reasonable legal remedies to motivate performance. Promisors may want, therefore, to be able to undertake a legal obligation to perform. Accordingly, a principle that makes performance legally obligatory and enforceable in certain instances and under certain conditions can be something that would be wanted by both promisors and promisees.

What might such a principle entail and how might it provide a reasonable moral basis for the enforceability of contracts? Suppose a situation in which each party knows that both have reasons for wanting respectively to give or to obtain an assurance that one of them will do something unless the other releases him or her from so

24. See *id.* at 99-111.

25. I am summarizing his discussion found at *id.* at 93-99.

doing.²⁶ One party—the promisor—acts with the aim of providing this assurance by indicating to the other party—the promisee—his or her intention to undertake a legal obligation to perform it. Not only does the promisor intend that the promisee knows that he or she is providing such assurance and undertaking a legal obligation to fulfill it, but the promisee understands that this is the promisor's intention and the promisor knows that the promisee knows this. Scanlon seems to be of the view that nothing less than an *actual* intention on the promisor's part to provide such assurance will suffice.²⁷ Finally, assume that the promisor has adequate opportunity to avoid legal liability (and therefore has sufficient understanding of his or her situation, has not been unacceptably constrained, has adequate opportunity to know in advance the legal penalties for breach of contract, and so forth) and that the remedies for breach are not excessive. Scanlon argues that if, on these conditions, a promisor makes a promise and fails to perform without being released by the promisee and without special justification, it is permissible to enforce legal “remedies such as specific performance and the payment of [reasonably foreseeable] expectation damages” for the breach.²⁸

Scanlon contends that a principle which embodies the foregoing stipulations and conditions “cannot be reasonably rejected” by either party.²⁹ The justification for this conclusion is in two steps. First, a principle of this kind reflects the fact that two parties have *reason to want* to provide or obtain assurance, and enlist the use of legal remedies to give support to the value of this assurance. Thus there is, *prima facie*, good reason to permit the state to provide such enforcement.³⁰ The second step asks whether this use of state power is something to which those against whom it may be used can reasonably object.³¹ Without going into the details of Scanlon's discussion of this aspect, we may say that, according to him, the principle ensures that individuals have adequate understanding

26. This and the following paragraphs summarize Scanlon's presentation of his argument for the reasonableness of contractual enforcement found in *id.* at 103-11.

27. *Id.* at 104 (“The principle I propose ... requir[es] that A must indicate that he *understands himself* to be undertaking a legal obligation to do X.” (emphasis added)).

28. *Id.* at 105-06.

29. *Id.* at 108.

30. *Id.*

31. *Id.*

and opportunity to avoid making assurances, or incurring legal consequences for so doing, if they do not wish to be subject to state power for breach of their promises. Moreover, the costs of enforcement, including the proportionality of remedies to the aim of providing assurance, are not such as to give promisors a reason for rejecting this principle. Because individuals have reasonable opportunity to avoid being bound, they cannot reasonably complain about legal enforcement when they manifest the requisite intention to perform. The fact that they may have reasons to regret their promise when performance is due cannot be a basis for rejecting the principle: the very point of the assurance is to rule out this kind of reconsideration, and promisors have intentionally provided this assurance when they can reasonably avoid doing so. To allow them to escape legal enforcement on the basis of regret nullifies the whole point of the assurance which they want to, and do, provide.³²

How does this explanation of contractual obligation answer the Fuller and Perdue objection? Scanlon argues explicitly that a principle of the foregoing kind would justify expectation damages or specific performance for breach of a purely executory contract; that is, before either party has performed and apart from detrimental reliance upon the promise.³³ The principle thus “recognizes an independent basis of purely contractual obligation.”³⁴ One rationale for legal enforcement is that “the threat of legal enforcement of specific performance or expectation damages provides people with an incentive to fulfill the contracts they make.”³⁵ But as Scanlon himself notes, this rationale views contract remedies as having a “quasi-criminal aspect”³⁶ and so does not explain them as compensatory in character. How then, contra Fuller and Perdue, does Scanlon’s account of contractual obligation show that the expectation remedy can be understood as compensatory? Scanlon suggests that, in addition to deterring promisors from breaching contracts, the expectation remedies “give promisees what they have wanted

32. *Id.*

33. *Id.* at 111.

34. *Id.*

35. *Id.* at 110.

36. *Id.*

to be assured of (or come as close to doing this as is practically possible.)”³⁷

This answer cannot, however, possibly meet the Fuller and Perdue objection. The fact that both promisors and promisees may *want* to be assured of something does not, in itself, establish that either *owes* the other this thing or, correlatively, that either is *entitled* to it as against the other. Fuller’s point is that a commitment to give anything, including the assurance of performance, need not entail the creation of a legal or, let us say, a juridical, relation of corresponding right and duty between the parties.³⁸ The possibility of such a relation, which makes the thing assured something that belongs in a juridical sense to the promisee just in virtue of the promise and prior to the moment of performance, remains unexplained in this account. Failing to perform what has been assured can quite reasonably and intelligibly be viewed as failing to confer a benefit which the promisee expects and upon which he or she may rely. This does not, however, show that what is promised is acquired by and belongs to the promisee just on the basis of the other party’s promise, thus allowing breach to be viewed as an interference with a present asset from which the promisee can by rights exclude the promisor.

The difficulty with Scanlon’s suggested rationale can be put this way. It is the first step which provides the crucial *positive* basis for contractual obligation. By contrast, the role of the second step is essentially negative, ensuring that the imposition of the obligation does not take parties unfairly by surprise, that it can reasonably be avoided by those who do not wish to be put under such an obligation, that the remedies for breach are not excessive, and so forth. The second step does not specify, nor does it in any way constitute, the contractual obligation obtaining between the parties. It is the first step, and it alone, that is fitted to do this. Yet, in Scanlon’s account, the first step is rooted in the *usefulness* of promises to parties and so embodies the idea of the *rational* as distinct from that of the *reasonable*.³⁹ The fact that promising

37. *Id.*

38. See *supra* notes 13-16 and accompanying text.

39. The distinction between the rational (conception of one’s good) and the reasonable (fair terms) is taken from Rawls. See, e.g., JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 6-7 (Erin Kelly ed., 2001).

involves an *intentional* giving of assurance in circumstances where the promisor *knows* that the promisee *wants* the assurance does not make it juridically *unreasonable* for the promisor to fail to perform, at least in the absence of invited detrimental reliance by the promisee upon the promise. Strictly speaking, there is nothing in Scanlon's first step that entitles the use of the idea of "owing" as between the parties. In Scanlon's argument, it is the second step, not the first, that embodies requirements of the reasonable. But the second step, I have said, contributes nothing positive toward the existence and the specificity of the contractual obligation.

C. Gordley

The third and final analysis of the moral basis of contractual obligation that I wish to consider is that of James Gordley.⁴⁰ He too seeks explicitly to answer Fuller and Perdue. He sees clearly that the correctness of their objection stands or falls with the propriety of their premise that a promisee does not acquire a right to performance at the time the promise is made, so that the breach cannot be understood as depriving him or her of something to which he or she is already entitled.⁴¹ At the same time, as Gordley emphasizes in his criticism of prior efforts to answer the Fuller and Perdue objection, it is not enough simply to assume or to assert the existence of such a right.⁴² We must be able to explain it and provide reasons for concluding that the promisee has it. Rather than try to show why any promisee should invariably acquire a right to performance, Gordley suggests that "[i]t would be better to ask why he would sometimes want such a right and why the promisor might wish him to have it."⁴³ Supposing the parties have a reason that the law should respect, then, in those instances, it should recognize such a right. He then notes a number of reasons why parties might want to transfer a right to performance by gift or exchange.⁴⁴

40. This Section draws on James Gordley, *Contract Law in the Aristotelian Tradition*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS*, *supra* note 9, at 265.

41. *Id.* at 327-28.

42. *Id.* at 329.

43. *Id.* at 330.

44. *Id.* at 330-32.

In the case of gifts, promisors might wish to confer a right to performance because they rightly believe that their present decision to make the gift is more likely to be correct than a future decision not to make it; or promisors may rightly believe that conferring such a right on promisees is more consistent with the kind of relationship the promisors want with the promisees; or finally, promisors may know that promisees do not trust them to perform in the absence of a legal obligation and may wish to reassure the promisees.⁴⁵ In the case of exchanges, promisees may want the right to performance in order to lock in a favorable bargain. To achieve this, promisees may promise promisors some benefit in return.⁴⁶

Notice that all these reasons, however different they may be in content, refer to what one or both parties may want or believe at a given point in time. Promisors may want to give a gift for various reasons and may believe that this present desire is “better” or “more correct” than a future contrary preference or decision. Promisees may want to be sure that they can count on performance by promisors. The sort of reason that Gordley suggests has to do with the interests that parties may have in giving or receiving a right to perform. Indeed, the reasons amount to interests that the parties may have simply in making gifts or exchanges.

What, however, can be said to the party who changes his or her mind because he or she no longer has that interest at the time performance is required? If it is *simply* a question of a party’s interests in making a gift or exchange, why should the party be constrained by interests that he or she no longer has? We must analyze this question on the premise that the promisee has not relied detrimentally and that the issue is one of enforcing purely executory contracts of gift or exchange. If the reason for the transaction lies in the promisor’s interest in making it, that reason has force only so long as that interest continues. Breach reflects a change in the promisor’s interests, nothing more. The idea of constraint is without support. Where it is the promisee’s interest that counts, then, at most, the argument so far shows simply that non-performance will frustrate the fulfillment of that interest. Once again, it shows that breach constitutes merely a failure to benefit

45. *Id.* at 330.

46. *Id.* at 331.

the promisee, not the deprivation of anything that already belongs to the promisee as a matter of rights. In conclusion, unless there is something more than an analysis of the parties' reasons for wanting to give or receive performance, a *right* to performance remains unexplained and the Fuller and Perdue challenge stands unanswered.

Gordley must supplement this account of reasons with something more. And this something more is a teleological ethical analysis in terms of virtues which draws on the Aristotelian tradition.⁴⁷ Briefly, the parties' interests in giving and exchanging are referred to the virtues of liberality and commutative justice. The law should advance these virtues, all things being equal. At least, interests and acts that fulfill these virtues are worthy of legal recognition. This second step parallels the second step in Scanlon's argument.⁴⁸ In contrast to the essentially negative and limiting function of Scanlon's second step, however, Gordley's appears positively to provide the needed basis for the promisee's acquisition of a protected interest in the performance at contract formation.

Following Aristotle's definition of liberality which entails giving "to the right people the right amounts and at the right time,"⁴⁹ Gordley argues that the selective enforcement of certain donative promises is justified on the ground that keeping such promises accords with, and embodies, the virtue of liberality. This requires evaluating and weighing the motives, purposes, and relevant circumstances of the donor, the needs and moral worthiness of the donee, presumably the value and the ethical significance of alternative uses of the benefit including the legitimate interests and needs of third parties, and so forth. The aim of this exercise is to determine whether and to what extent a given promise qualifies at a given point in time as an act of liberality.

But even where a promise does qualify as an act of liberality, it cannot therefore rule out a later change in the promisor's intention. No one is presumably under an obligation to exercise liberality toward a particular person on a particular occasion. Rather, giving to a particular person on a particular occasion is merely a way of

47. I draw here on the discussion in Gordley, *supra* note 40, at 297-313.

48. See *supra* text preceding note 32.

49. Gordley, *supra* note 40, at 297 (quoting ARISTOTLE, NICOMACHEAN ETHICS, in THE BASIC WORKS OF ARISTOTLE 935 (Richard McKeon ed., W.D. Ross trans., 1941)).

instantiating liberality. It need not occur in just this way. So acting in accordance with the virtue of liberality does not entail that one *must* keep any particular donative promise. Moreover, the very character of this virtue is inherently unsuited to specify the kind of transactional obligation for which we are looking. For, firstly, the virtue specifies a state of *inward* moral character that is expressed in external acts, and so, unlike for example the virtue of justice, in no way essentially involves relation to another. And even if there is some obligation in relation to others, it is not one owed to anyone in particular. There is nothing in the idea of liberality that suggests the sort of relation that might constitute a transfer of rights between two, and only two, parties. Yet, as Gordley emphasizes, an answer to Fuller and Perdue must be on the basis of such a relation.

What about the virtue of commutative justice? This virtue *does* have the form of relation to another, indeed the very sort of transactional structure that is requisite to contractual obligation.⁵⁰ Gordley argues that a grossly unequal exchange of values is ruled out by commutative justice unless the difference is intended as a gift. Thus, where the parties have an interest in making an exchange on equal terms, enforcing the agreement is in accordance with commutative justice.⁵¹ However, this shows only that the enforcement of certain promises is or is not compatible with the requirements of commutative fairness, not why a promise to exchange on fair terms is unalterable and binding in the first place. Though a promise to exchange equal value may be consistent with commutative justice, it does not follow that the failure altogether to perform this promise violates it. Why an intention or promise to exchange for equal value should be binding despite a later change of mind on the part of the promisor cannot be explained simply by the fairness of the terms so intended or promised. Performance of such a promise may be permissible because it is consistent with equality in exchange, without being obligatory. But unless it can be so conceived, the promisee does not have the requisite protected interest to justify the expectation remedy as compensation. A theory justifying enforcement of promises must show how a promise, as part of a voluntary interaction between two parties, is so constituted

50. *See id.* at 307-08.

51. *See id.* at 308-10.

that it can accomplish a transfer of rights from one to the other, thereby establishing a relation of right and duty with respect to a promised performance. Presumably, the explanation of a requirement of equality in exchange would be part of this analysis.

In Gordley's discussion, the intelligibility of promise as a mode of transferring rights remains unexplained from the standpoints of both commutative justice and liberality. Although promises may instantiate, be consistent with, or instrumentally further liberality and commutative justice, these virtues are specified and justified independently of any analysis showing how promises can be understood as rights-acquiring or rights-alienating acts and therefore how the parties' voluntary interaction can *constitute* a transfer of rights between them. Gordley's analysis of gift and exchange merely confirms Fuller and Perdue's basic claim that the expectation remedy cannot be explained as compensatory but instead must be justified on policy grounds of some sort.

Despite their evident differences, the three justifications of contractual obligation discussed above share a common feature, and it is this feature that prevents them from providing an answer to Fuller and Perdue. Whatever else it entails, contractual obligation is a direct normative relation between two parties, and this relation must embody reasonable or fair terms of interaction such that, through their mutual assents, one party acquires something that comes under his or her rights exclusive as against the other party. In this way, the contractual relation can be understood as juridical and nonperformance of a promise can be conceived as injury, making expectation damages or specific performance compensatory in character. Each of the theories considered bases the direct relation between the parties on substantive interests that reflect their rational good and particular purposes: the idea of the rational. The parties have reasons to want to give and receive commitments and they communicate their decisions to do so, knowing that this is what the other party wants and this is how the other party understands his or her words. But the fact that something is wanted and answers to one's rational advantage does not, as such, bring into play the morally distinct idea of the *reasonable*. Something more is needed to specify fair terms of interaction. The idea of the rational does not, and cannot, explain why, even if one regrets one decision on the basis of a different understanding of one's interests and

purposes, one is nevertheless constrained to honor it as something owed to the other party. More particularly, the idea of the rational does not show how merely failing to serve another's interests can signify injuring something that already belongs rightfully to the other. It is not surprising, therefore, that the three theories supplement this analysis with something else that goes beyond the idea of the rational only. I have tried to show in some detail, however, that in each case the additional element is inherently unsuited to establish the specific kind of normative relation between the parties that must be presupposed if the expectation remedy is to be understood as compensatory. We need to make a fresh start to see whether it is possible, after all, to frame a conception of contractual obligation that illuminates, and does not obscure, this most basic datum of contract law.

III. CONTRACT AS A TRANSFER OF OWNERSHIP

My primary aim in this third Part is to set out clearly and in some detail an analysis of contract formation that explains how the parties' mutual assents can transfer an ownership right from one to the other prior to and independently of performance, and on this basis show that breach of contract is an interference with a protected interest, making the expectation remedy compensatory in character. I argue that this analysis, which I call "contract as a transfer of ownership," is internal to, in the sense of being at least implicit in, the way contract formation is understood from a legal point of view. To this end, I discuss in detail how the conception of contract as a transfer of ownership is reflected in the doctrines of contract formation. I also explain how this analysis of contract is continuous with the well-accepted principles of property acquisition while being qualitatively distinct from it. A key contrast that I develop in the following argument is that between property and ownership. On the view that I shall elaborate, "ownership" is a larger, general conception of which "property" (right in rem) is a particular instance. Contract rights, I shall argue, are another, different particular instance of ownership rights.⁵² Consistent with

52. This view is clearly Kant's, among others. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (1797), reprinted in *PRACTICAL PHILOSOPHY* 353, 424 (Mary J. Gregor ed. & trans.,

this view, I refer to contract as a transfer of *ownership*, not as a transfer of property.

A. The Analogy of a Physical Transfer of Ownership

I begin the task of specifying a conception of contractual obligation that justifies the compensatory character of the expectation remedies by considering a simpler legal transaction that introduces crucial constituent features of the contractual relation.⁵³ Let us suppose, then, a physical transfer of ownership whereby I physically give you something that you in turn physically take from me. We do this in the absence of any prior agreement. I may give the thing to you either for nothing or for something else in return. Before the transfer, I own it; after the transfer, you do. Such a transfer of ownership from one person to another is constituted by certain definite mutually related acts. What are these acts?

First, in order to transfer ownership, there must be a decision on the part of the owner to part with his or her property. This decision is embodied in the physical giving of the thing over to the other party. A merely physical transfer that does not express this intent cannot produce a change in ownership. Unless the first party expresses his or her will to give up the thing, it is not available for appropriation by the second party or by anyone else. Accordingly, the act of giving it over counts, we shall say, as the *external* expression of the will to alienate the thing.

But the will to alienate is not, by itself, sufficient to constitute a transfer of ownership. The immediate and necessary consequence of alienation is that the one who alienates ceases to be owner. By itself, this does not make anyone else the thing's owner. To confer ownership upon the second party and thus to constitute a transfer of ownership, a second act is also necessary. The second party must express the will to appropriate the thing as his or her own. This decision to appropriate, embodied in the taking of the thing, must come *after* and *in response to* the decision to alienate. Otherwise the act of the second party cannot be compatible with the first party's

1996).

53. Grotius notes the parallel between what I call a "physical transfer" and contract. See 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* bk II, ch. VI, at 260-61, ch. XI, at 330-31 (Francis W. Kelsey trans., Clarendon Press 1925).

right of ownership and so no right can be acquired. Thus a transfer of ownership is constituted by two acts that are temporally successive.

The relation between the acts of alienation and appropriation must be further specified in the following way. The idea of a *transfer* of ownership *from* one *to* another implies: first, that the second party's acquisition of ownership comes, not only with the consent of, but also *from*, the first party; and second, that the right of ownership that is in the first party is the very same that is acquired by the second.

The significance of the first point may be brought out as follows. If the first party merely *abandons* his or her thing such that it ceases to be owned by him or her, it may, consistently with rights, be appropriated by *anyone* else. If someone does take it, he or she does so as a finder who will have a right to the thing as against anyone else who does not already have an existing proprietary right in it. The important point is that any such right would not be *derived from* the decision of the first party. The fact that the first party was once an owner of the thing does not figure in the analysis of the acts that are positively constitutive of the finder's right. It has merely the negative significance that the thing is *not* owned and so, to that extent, is available for appropriation by others. The thing is appropriated in the condition of being unowned. The idea of a transfer plays no role whatsoever.

For there to be a transfer, then, the second party's ownership *must derive from* that of the first party in the sense that the second party must appropriate the thing *in the condition of being presently owned* by the first. Now, in general terms, a person's exercise of the power to alienate his or her thing is an exercise of ownership rights.⁵⁴ If, therefore, the second party is to appropriate the thing *qua* presently owned by the first, the former must exercise the power to appropriate in relation to the latter's exercise of the power to alienate. It must be possible to conceive the acts of alienation and appropriation as two mutually related and absolutely co-present exercises of ownership with respect to the object of ownership. Insofar as these acts transfer ownership from one person to another, neither side can be considered without the other. The

54. I discuss this uncontroversial proposition in detail at pages 1700-01 of this Essay.

fundamental unit of analysis is therefore this relation as such. In sum, a transfer is constituted by mutually related acts that must be understood under the two aspects of being successive in time and also co-present.

In the case of a physical transfer of property, the party who appropriates the thing gains ownership of it simultaneously with physical possession of it. Like the party who transferred the property, he or she has the very same right to exclude others from using it without his or her consent. There is no difference in the right alienated or appropriated. The fact that the parties may have different purposes for transacting or that the transfer may affect their well-being in different ways does not change this identity. This is because all such potentially differentiating factors are, in themselves, irrelevant to the analysis of the transfer of ownership.

To elaborate, whether parties have transferred ownership is not determined by reference to the particular purposes or needs that may motivate their decisions to transact, and the validity of the transfer does not depend upon whether the parties are better off or sufficiently satisfied as a result of the transfer. The only thing that counts is whether the parties can reasonably be viewed as having *done* the requisite acts of alienation and appropriation. When I hand over my thing to you and you take it, it is yours even if I come to regret my decision to do this.⁵⁵ And it is yours just and only because of our jointly related acts. What counts is simply whether one party has given up physical control over the thing by placing it under the other party's control. The undeniable fact that parties have particular substantive ends and needs that lead them to transact is irrelevant to the legal analysis of whether they have transacted. The only requirement is that the physical movements of giving and taking the thing express an intent to alienate and appropriate it, thereby investing these physical movements with the meaning of giving up control in favor of another who asserts control. The physical movements must be purposive conduct in this sense. In given circumstances, it may certainly be the case that the fact that a party has this or that purpose may be indirectly relevant in

55. I assume here, of course, the absence of vitiating factors such as fraud, duress, misrepresentation, and so forth that would be defenses to the second party's claim via the transfer.

establishing the existence of purposiveness. Still, whether a party's particular purpose is fulfilled by the transaction does not bear on this requirement and therefore is irrelevant to the analysis of the validity of the transfer.

Having physical possession of the thing transferred, the appropriating party can rightfully exclude any and every third party who does not already have possession of it. *Vis-à-vis* such others, first possession is the basis of entitlement. But what about as against the party who transfers ownership? The essential condition of the second party's right to exclude the first is the latter's voluntary alienation of his or her thing. Because the first party has present physical possession before the second party, it is the former's consent to transfer ownership that makes the latter's taking possession consistent with rights. This being so, the relation of rights between the parties to the transfer is founded upon a different basis than the relation between the second party and all those not privy to the transaction. The relation of rights between the transacting parties is wholly specific to them and is established between them as two definite persons through their interaction.

B. From First Acquisition to Contract

Taking this discussion of a physical transfer of ownership as a starting point, I want now to consider what the analysis of a transfer presupposes, namely, that it must be possible to acquire *unowned* things, and what this analysis yields, namely, the possibility of a *contractual* transfer of ownership. I shall do this by drawing upon widely accepted principles and fundamental normative ideas in private law.

A physical transfer of ownership involves appropriation by one person from another of something that is *already* owned. Hence, if an infinite regress is to be avoided, a transfer presupposes that it must be possible for individuals to acquire something by themselves and not only through others. This form of acquisition would have to be of something that is not presently owned, since otherwise it would have to be transferred. To acquire an unowned thing, it is not sufficient to need or wish for it: one must *do* something.⁵⁶ Prior to

56. I discuss in more detail the requirements for the acquisition of unowned things in

this act, and therefore in the absence of a right of ownership with respect to the thing, the object is available to anyone and everyone. Each has a liberty or privilege,⁵⁷ as opposed to a right, to do as he or she wishes with it. But this liberty means no more than that no one can wrong another by making use of the thing, and that therefore no one's consent is necessary before others may permissibly affect it.⁵⁸ Because, prior to any act, there is only a common liberty, and no right, to affect things, anyone can make use of things on the basis of his or her unilateral decision and without the prior consent of others. With the performance of the requisite act, all this changes. Now the one who does the act is entitled to exclude others from using it without his or her consent. They are no longer at liberty to do with it as they will and therefore they no longer have the power to make the thing their own through their unilateral acts. Inasmuch as this change affects only their liberty and not their rights, however, they have no rightful grounds to oppose it.

What sort of act is necessary and sufficient to establish this right of ownership with respect to unowned things? It must be an act that brings the thing under the agent's present and effective power to affect it as he or she wishes—that is, under his or her control. More precisely, it must be an act that has this character *so far as reasonably appears to others*. Whether there is such an act is determined wholly from this external, meaning other-related, point of view. Now, where the object to be acquired is unowned, it must be something that is distinct and physically separate from the person, otherwise, if it were attached to or a part of the person, it would already belong to him or her by the right of bodily integrity. Therefore an unowned object must be a corporeal thing that exists in space independently and apart from persons.⁵⁹ How, then, can

Peter Benson, *The Philosophy of Property Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 752, 759-77 (Jules Coleman & Scott Shapiro eds., 2002).

57. In Hohfeld's sense of the term. See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 39, 42-50 (Walter Wheeler Cook ed., 1923).

58. Pufendorf emphasizes this in his discussion "On the Origin of Dominion," which is Chapter IV of Book IV of *ON THE LAW OF NATURE AND NATIONS*, *supra* note 1, at 532, 550, 553-54. He explains this juridical condition as one of things being in common or in community in a negative sense in which, prior to any act, no one has a right to anything that is exclusive vis-à-vis others and things belong no more to one person than another. *Id.*

59. This is Kant's argument. KANT, *supra* note 52, at 401-02.

individuals manifest to others the fact that they have present and effective power to affect such a thing as they wish?⁶⁰

In answering this question, it is crucial to keep in mind that the sort of object at issue here, being unowned, must be a corporeal object that is physically separate from individuals and also must be acquirable by individuals acting unilaterally, that is, without the actual consent or participation of others. The idea of social cooperation plays no role here whatsoever. Consequently, the requisite act which makes this object one's own must be one that, independently of any prior agreement with others, can reasonably appear as such to all those who are at liberty to affect it. And because any and every one is identically at liberty to affect it, the act of unilateral appropriation by one must convey the requisite meaning to unspecified, indeterminate others. Given these premises, it is difficult to conceive how, as an empirical matter, individuals can manifest to others that they have brought these objects under their exclusive control except by initially *physically affecting* them in ways that reasonably evidence such control. One who exercises this control over a corporeal object has physical possession of it. Private law doctrine refers to this act of control as "occupancy." We see, then, that, from a legal point of view, the whole role and significance of physical occupancy must lie in its being a *sign* to all others that one has brought a corporeal object under one's purposes by one's unilateral decision. So long as others, who do not have present control over an object, may reasonably infer a person's purposive subordination of the object to his or her wishes, a right of ownership arises against them. In this way, the person who establishes this control by taking the thing into his or her physical possession *before* others is deemed owner relative to those others. *First* occupancy is the basis of original acquisition, that is, acquisition of unowned things.

Although individuals must *initially* take physical possession of something to make it their own, it by no means follows that their right of ownership depends upon their *continuing* to do so.⁶¹

60. For more detailed discussion, see Benson, *supra* note 56, at 761-64.

61. As Oliver Wendell Holmes stated:

Every one agrees that it is not necessary to have always a present power over the thing, otherwise one could only possess what was under his hand....

... When certain facts have once been made manifest which confer a right,

Physically holding the thing is significant only because, and insofar as, it demonstrates the requisite control over it. As a matter of fact and depending upon the kind of thing, circumstances, and so forth, such control can be reasonably evident to others without the necessity of continuous physical holding. So long as this control is reasonably manifest to others, that is enough to sustain the existence of the ownership right. Further, though the individual who so acts does so for particular reasons and in the pursuit of particular interests, these reasons and interests in their particularity play no direct role whatsoever in determining whether the requirements of first occupancy have been met. The intent to subordinate something to one's control can be evident so long as one's conduct can be viewed as purposive, whatever the particular purpose or interest pursued.

There are essentially three modes in which one can exercise the right of ownership.⁶² Each of these reflects three distinct ways in which one can make reasonably apparent to others one's control over one's thing. The initial act of taking physical possession of something presently unowned *establishes* control over the object and, with this, the right of ownership in the thing vis-à-vis others. This is appropriation and, conceptually, it is the first way in which ownership exists and is exercised. Having control over the thing creates the possibility of using it for one's purposes and needs, whatever these may be. The failure to put the thing to any uses at all brings into question the continuance of the intent to control the thing, and consequently the very basis of the ownership right. Actual use of what one controls is thus the fulfillment of taking possession and represents the second way in which ownership is exercised. In addition to taking possession and use, there is a third way of exercising the right of ownership: one may decide to abandon it altogether or yield it into the control of another. This third way, which is alienation, asserts control over the thing but in a manner

there is no general ground on which the law need hold the right at an end except the manifestation of some fact inconsistent with its continuance

OLIVER WENDELL HOLMES, *THE COMMON LAW* 186 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

62. The discussion in this paragraph follows Hegel's account of the three "modifications of property" in G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* para. 53 (T.M. Knox trans., 1952). I present this approach in more detail and contrast it with the "bundle-of-rights" view in Benson, *supra* note 56, at 768-77.

that makes evident to others that one will not use it. It entails doing something, or failing to do something, to or with one's thing that places it beyond one's control. It is an act that both presupposes and nullifies such control. The result of this exercise of control is that the thing is placed in a condition of being available to others in general or to some definite person, not the now-former owner. With this, the analysis returns to the first step—the liberty to appropriate and the necessity of taking possession—and so is completed.

The preceding discussion makes clear that in order to constitute oneself as an owner of something, one must perform acts which themselves are acts of ownership. To be an owner one must actually exercise the power of ownership: one must take possession, use, or alienate the thing. Enforceability is nothing other than the normative meaning of these acts. Thus, whether legally enforceable consequences flow depends wholly upon the existence of the requisite acts. And although these acts must be purposive, their status as acts with normative meaning is entirely independent of the particular purposes or interests that may motivate the agent. Their status as acts is not tied in any way to an agent having a certain purpose or interest. Moreover, the fact that an individual needs or wishes for something does not qualify as an act, and certainly not the sort of external act that meets the requirement of occupancy.

The immediate and necessary juridical consequence of appropriation is that the object is no longer available to others to possess, use, or alienate. Others' acts can no longer qualify as acts of rightful appropriation, use, or alienation.⁶³ Reflexively, the owner alone can permissibly perform these acts. Note that any and everyone who does not already have ownership of the thing is under this identical disability. The acquired right is, in this sense, a "right against the world": a right in rem. This prohibition applies, however, to each person as a distinct and separate individual capable of acting for his or her own purposes. More precisely, it applies as between the owner and each other person who can actually affect the owner's object. The fact that the right is in relation to persons who count as (indefinitely) anyone, and is therefore a right in rem, is entailed by the idea of acquisition of *unowned* things and more particularly

63. 2 PUFENDORF, *supra* note 1, at 536 ("[P]roprietorship connotes the exclusion of another's right to the same thing").

the fundamental point that one can acquire these only by one's unilateral act. This is the only character ownership can have when it is with respect to such objects.

It is important to underline that on this analysis, the right of ownership does not in the least ensure that owners can actually use their things or that they will be better off or satisfied if they do use them. Whether an owner's interests, needs, or purposes are met is of no direct consequence, juridically. The only thing that the right ensures is that no one else can rightfully appropriate, use, or alienate the owner's object without his or her consent. Of course, if the owner no longer wants the object because it fails to satisfy his or her interests, and, as a result, the owner gives it up through nonuse or by an express decision to alienate it, the object becomes once more available to others. But this consequence flows from the owner's acts, not from the non-satisfaction of his or her interests.

A physical transfer of ownership presupposes that it is possible to acquire unowned things ("first acquisition") and I have explained how this is accomplished by one's individual action without the participation or consent of others.⁶⁴ There is continuity between the analysis of first acquisition and a physical transfer of ownership. The constituent acts of ownership in first acquisition—appropriation and alienation—are the very same that figure in a physical transfer of ownership. In both, enforceability is the normative meaning of the requisite acts. In neither do the needs or particular interests and purposes of agents belong to the constitutive grounds of rights. Whether an unowned thing has been acquired as property or a thing owned by one person has been transferred to another is decided wholly by whether the required acts have taken place, irrespective of the bearing of this conclusion upon anyone's needs or purposes. The determination in both forms of acquisition is framed in terms that abstract from the question of advantage or disadvantage.

The idea of a transfer of ownership, we saw, requires that the right acquired is identical to the right that is alienated. The analysis of first acquisition is fully consistent with this. The right of ownership, comprising the three aspects of taking possession, use, and alienation, is not defined in terms of the particular (and different) purposes to which individuals may put their things or in

64. See *supra* pp. 1698-99.

terms of the particular (and different) interests which they seek to satisfy in so using them. These factors are irrelevant. Rather, the right of ownership is defined simply as an abstract right to exclude others from treating it as their own. No reference is made to any factors that might differentiate the persons excluded from the owner. Because the right of ownership is defined in abstraction from all differentiating factors, it is the same right throughout and it is identical in every instance of its exercise. Without this, it would not be possible to conceive of one and the same right being transferred from an initial owner to a second party.

At the same time, the analysis of a transfer of ownership goes one step further than that of first acquisition insofar as the former makes *interaction between two definite persons* the constitutive basis of the acquisition. In first acquisition, ownership is established through an individual's unilateral act. Yet the essential normative meaning of ownership is that it entails relation to another: others are no longer at liberty to possess, use, or alienate the object that comes under another's right. In keeping with this other-related normative meaning, the standpoint from which an individual's acts are judged is how these acts are reasonably viewed by others. A transfer makes relation to another the essential and explicit basis of acquisition, thereby bringing out what remains merely latent in first acquisition.

The modality of a physical transfer of ownership not only makes explicit the other-related character of the ownership right that is established by first acquisition. In addition, it implicitly contains the constitutive acts of *contractual* acquisition, as I will now explain.

The central difference between a physical transfer and contract is that contract distinguishes and separates in time the two aspects which coincide in the physical transfer: rightful acquisition and physical delivery. In a physical transfer, the transfer of ownership coincides with physical delivery. The latter is the vehicle of the former. By contrast, the parties' entitlements in a contract are fully and completely established by their agreement, prior to and independently of performance through which physical delivery is effected. On this view, the constitutive acts of alienation and appropriation in a contract transfer ownership before the change in physical occupancy, in this way providing the needed basis for construing the expectation remedy as compensatory. If we can show

that this difference between contract and a physical transfer simply brings out what is already implicit in the latter without introducing any additional or extraneous considerations, this would be the first step toward specifying a conception of contract that is juridically plausible and reasonable. This is what I shall now try to do.

The possibility of differentiating between agreement and performance, and therefore between the aspect of rightful acquisition and obtaining physical possession, rests upon two premises. First, it must be possible for someone to have something as his or her own exclusive of others without first having actual physical possession of it. Second, it must be possible for parties mutually to alienate and appropriate ownership simply through their mutually related expressions of assent prior to and independent of delivery.

These premises are already contained in the preceding explanations of first acquisition and physical transfer.

As to the first premise, I have already discussed how first acquisition, although it rests upon an initial act of physical taking into possession, does not require *continuous* physical possession. So long as owners can reasonably signal to others their continuing present control such that they can do as they please with their things, that is sufficient. Continuous physical possession may not be necessary to demonstrate this in given circumstances. This point rests upon a deeper basis.⁶⁵ The object of first acquisition is an external thing that is separable from persons. Indeed, it is only insofar as it is actually separate and distinct from me that it can count as such an object. If it is part of and not separate from me, it is something that already belongs to me without my needing to acquire it. Accordingly, if my right to something, say my pen, depends upon the object being in my physical possession so that it immediately ceases to be mine when I put it down, another can only affect my right to it by impinging on me (my body). This, however, would engage only my right to bodily integrity, not a right to some external object that must first be acquired. The fact that my right is supposed to be with respect to an *external* thing would play no role as such and would not be made evident. Therefore, it is implicit

65. I am following Kant here. His discussion is in the *Doctrine of Right*, part of THE METAPHYSICS OF MORALS, *supra* note 52, at 401-04.

in the notion of acquisition of an external thing that it cannot *require* physical possession of it of any kind.

This brings me to the second premise, namely, that the preceding analysis of a physical transfer already contains the idea that it is possible for parties mutually to alienate and appropriate ownership simply through their mutually related expressions of assent prior to and independent of delivery.

In a physical transfer, ownership is vested in the second party simultaneously with delivery. Indeed, it appears that it is *in and through* delivery—and therefore the actual physical giving and taking—that rightful acquisition is accomplished. We have seen, however, that it is not physical delivery as such that transfers ownership. Unless delivery expresses the requisite assents of the parties, there is no change of ownership. To produce juridical effects, the physical giving and taking must express and embody, respectively, the will to alienate and the will to appropriate. From a legal point of view, delivery is normatively significant solely inasmuch as it embodies the parties' mutual assent. The decisions to alienate and to appropriate take the form of giving and taking physical possession. Mutual assent is the regulative normative idea. It is signaled through the physical acts of transfer. In the analysis of both the physical transfer and first acquisition, the requisite physical acts are justified on the ground that, in given circumstances, they are needed to *signal reasonably to others* the taking or giving of control. The fact of their being physical has no intrinsic significance.

We have seen that the key feature that distinguishes a physical transfer from first acquisition is that, in the former alone, the right vests through the interaction between two parties. Implicit in the analysis of a physical transfer is the notion, then, that if the parties are able through their interaction to manifest to each other their mutual assents, this must be sufficient. Whereas in the case of a physical transfer the parties' mutual assents are expressed in the form of physical giving and taking, this is not the only way it can be done. In contract, the decisions to alienate and appropriate are embodied in an agreement, not in the giving and taking of physical possession. There is nothing inherently problematic in the parties expressing these decisions through the medium of language which is, after all, the most precise means by which parties can convey mutual assent to each other. In this case, in contrast to a physical

transfer, the acts manifesting mutual assent are *explicitly* expressions of assent: they are reasonably intended and understood as such. Of course, we have yet to specify what sorts of expressions are suited to signal this. I shall take this further question up in the next Part where I argue that expressions of assent that satisfy the requirements of offer and acceptance and of consideration are sufficient to do this.

Supposing for the moment that it is indeed possible to specify the mutual expressions of assent that constitute the requisite contractual acts of alienation and appropriation, the question is: what is the juridical effect of these expressions of assent?

In the analysis of a physical transfer, we saw that the basis of the second party's right to retain the object transferred in the face of change of mind by the first party is the fact of their mutual assent to transfer as expressed in the delivery.⁶⁶ By delivery, the first party gives up control over something in favor of the second who takes control over it. The fact that the first party may want or need it back for whatever reason is completely irrelevant. As I have tried to emphasize throughout the discussions of first acquisition and physical transfer, wants, needs, wishes, or expectations are not grounds of ownership. Only an act asserting control over something, so long as it is compatible with the rights of others, establishes ownership. The question of entitlement is decided simply by determining the existence or not of the requisite physical transfer. The relation of rights is just the normative meaning of this transfer. And because the second party's claim as against the first is rooted in their interaction (that is, the physical transfer), this entitlement applies only as between them. In relation to others, however, the second party's right rests on the fact that he or she has taken physical possession of the object before them in accordance with the principle of first acquisition.

This analysis applies to contract, only with the important difference that we must now take into account the contractual distinction between agreement and performance. Accordingly, the right that the second party acquires against the first at the point of agreement and prior to performance is one that is established through their mutual assents and is specified only as between

66. See *supra* Part III.A.

them. Once it is determined that the requisite assents exist, the question of contractual rights and duties is answered. There is no further issue as to why the promisor must perform as promised.⁶⁷ The answer must be that it is no longer within his or her liberty to act inconsistently with their agreement since the agreement has already vested ownership in the promisee. The duty to perform is simply the normative meaning of the transfer of ownership that has already taken place at the moment of agreement. Assuming the existence of such a transfer, the promisor has no grounds in right to claim the object. Breach is thus an interference with the promisee's ownership interest acquired at contract formation. It constitutes an injury in the legal sense. The expectation remedies may now be understood as correcting this injury and as ensuring that the promisee's ownership interest is respected. They are compensatory in character.

This protected interest belongs to the promisee as a result of the parties' interaction (that is, their mutual assents embodied in their agreement) and therefore holds *only* as between them. Prior to performance, the promisee has no protected interest in relation to third parties. When performance takes place and the promisee gains physical possession of the object of ownership, the promisee does have a protected interest against third parties in virtue of this physical possession in accordance with the principle of first acquisition. But as between the contracting parties, performance does not add to or in any way change the relation of rights. In legal contemplation, this relation must be completely and exhaustively established at the moment of agreement. If this were not the case, then the expectation remedy, which aims to give the promisee the value of the promised performance, would give the promisee something *new* in relation to what was acquired at contract formation. The remedy could not function as a principle of compensation. Fuller and Perdue's objection would stand.

67. This is Kant's point in his disagreement with Mendelssohn. Kant, *supra* note 52, at 423. I discuss this in Peter Benson, *External Freedom According to Kant*, 87 COLUM. L. REV. 559, 563-67 (1987).

C. The Constituent Acts of a Contractual Transfer: Offer and Acceptance and the Doctrine of Consideration

The next task is to specify in detail the form and content of the mutually related assents that can transfer ownership at the moment of agreement. What are the constitutive acts of contractual acquisition? I will draw upon the doctrines of offer and acceptance and of consideration to elucidate these acts.⁶⁸ Doing so makes it more plausible to view the idea of a transfer of ownership as having practical reality because it is implicit in actual legal principles and doctrines.

The central organizing idea of the common law doctrine of offer and acceptance is that a contract is formed by two externally manifested expressions of assent to the very same terms. An offer must include a promise by the offeror inasmuch as it necessarily looks to the future and gives the person to whom it is addressed an assurance that, on some contingency at least, he shall have something.⁶⁹ However, as opposed to the moral duty to keep one's promise, the offer binds in law only if it is met by the return assent of the offeror. A contract is made by both parties and is irreducibly two-sided. No obligation is imposed on the offeror unless and until there has been an acceptance. Thus the offeror makes the offeree a potential co-author of the relation; a second act is requested to complete the first. Indeed, an offer must say not only what the offeror promises to do but also what the offeree must do in return. The offer thus states a whole, two-sided transaction. In this way, the offer reflects in itself the requirement that the source of the obligation is in two manifestations of will, not one.

Consistent with this relational character of the offer, the question of whether there has been an offer and, if so, for which terms, is decided objectively—that is, by how the offeror's words and deeds reasonably appear to the offeree in the context of their interaction.⁷⁰

68. My discussion takes these familiar principles of contract formation as they are invariably presented in the case law and standard text books. I consider the two doctrines at greater length and more fully in Benson, *The Unity of Contract Law*, *supra* note 9, at 138-53 (offer and acceptance) and 153-84 (consideration).

69. Samuel Williston, *An Offer Is a Promise*, 23 ILL. L. REV. 100, 101 (1928).

70. On the definition and the role of the objective test, see Samuel Williston, *Mutual Assent in the Formation of Contracts*, 14 ILL. L. REV. 85 (1919).

It is this manifestation of assent as it reasonably appears to the other party that is operative in bringing about contract formation. The legally relevant factor is not its author's state of mind; nor is the expression of assent pertinent for the reason that it may be evidence of that state of mind. Rather, the reasonable appearance of assent *as such* is the real and true assent from the legal point of view. This is always so, even if a court could be persuaded in particular circumstances that the offeror's actual state of mind was otherwise. It is important to note here that, in accordance with this objective approach, the particular purpose or motive the offeror may have for proposing given terms is, in and of itself, irrelevant. The only thing that matters so far as contract formation is concerned is whether or not the offeror has committed to these terms, so far as may be reasonably determined by the offeree. While the existence of the requisite commitment may, in given circumstances, be reasonably inferred from knowledge of a particular purpose, it is the commitment, and not the purpose, that is the legally relevant factor. Unless commitment, reasonably construed, must be taken to be conditional upon the fulfillment of a purpose, the latter is not an operative factor at all in contract formation.

The fit between the relational character of the offer and the objective test does not hold when, as in *Fried* or *Scanlon*, the obligation is understood as self-imposed by the promisor's own act alone. In determining whether the promisor has manifested the requisite intention to promise or to give an assurance, it would be inappropriate, morally speaking, to apply an objective test. To the contrary, the promisor's actual understanding of his or her own words and actions as well as his or her actual intentions must count for something in their own right. One should consider such internal factors in their internality.

At common law, it is well established that the offer must come first and the acceptance must be given in response to and after the offer. It must reasonably appear to the offeree that there is an actual, subsisting offer to be accepted. Offer and acceptance must be made in temporal succession. In this way, the parties can bring about an agreement on definite terms *through their interaction alone*, without recourse to any third party. However, though the offer and acceptance must *originate* in temporal succession, they can be construed, paradoxically, as being made at the same time

at contract formation. Indeed, they must be such in light of the objective test of formation. Once it has been placed before the offeree, an unexpired offer is reasonably taken by the offeree to be presently and continuously made unless or until it is retracted. It is not as if it is made initially and that is all. For the offer to continue in time, there is nothing more that the offeror must do. When the offeree accepts the offer, it follows that the offer and acceptance are made at the same time. In other words, the fact that they originate at different times becomes irrelevant. The legal analysis of contract formation abstracts from any temporal dimension. Being "at the same time" means here absolutely co-present, such that one side cannot be what it is apart from the other. This is the so-called "meeting of the minds" or "common will" of contract formation.

This analysis of the assents that satisfy offer and acceptance fits with the way the constituent acts of a transfer of ownership are understood. A transfer of ownership, we saw, is constituted by two acts of will which are at once temporally successive and co-present; alienation and appropriation must be temporally successive in their respective origins if there is to be a transfer consistent with the rights of the first party. Yet it must also be possible to view the two acts as co-present, so that appropriation can be of something that is owned and thus be appropriation via a transfer. The fact that an offer must be one party's crystallized decision that is capable of being accepted by a second party means that it is not a mere expression of intention or wish that is subject to change or development by the offeror, but a present, fixed choice that stands to be completed by another's identical decision. To complete the offer, the acceptance must meet it as a second crystallized, present decision, indistinguishable from the first insofar as both must state the very same terms. Moreover, these mutually related decisions count as offer and acceptance only if they are both temporally successive and absolutely co-present. The fact that the decisions are expressed in the form of future-oriented promises does not conflict with their character as present, fully crystallized decisions, as distinguished from mere expressions of future intention or wishes. Rather, the future-orientation of promises permits these present decisions to continue in time, thereby making possible the crucial differentiation between contract formation and performance. In sum, the requirement of offer and acceptance seems to specify the parties' assents in

such a way that they can function as two sides of a transfer of ownership at contract formation and so prior to performance.

The doctrine of offer and acceptance, however, does not completely specify the sort of assents that can fulfill this function. It specifies *at a formal level* a certain definite relation between manifestations of choice (present decisions) that is essential to contract formation. But it does not say, for example, *what* must be offered and accepted or why the parties' mutual assents should be viewed as *transferring ownership*. Though the formal representation of the parties' mutual assents is an essential first step toward elucidating contract agreement as a transfer of ownership, we need to show next that these assents have a content that is amenable to this analysis. I shall now try to explain how this might be so by drawing upon the other main legal doctrine of contract formation: the requirement of consideration.

The doctrine of consideration, as I will now explain, specifies a content for the mutual assents of offer and acceptance that brings out even more fully the two-sided character of contract in a way that fits with the requirements of a transfer of ownership. It does this by drawing the familiar contrast between so-called gratuitous promises and those supported by consideration. The difference between them is conceptual and intrinsic.

To be enforceable, that is, to give rise to a claim that is protected by the expectation remedy, a non-formal promise must be supported by consideration. It is well settled that "consideration" is something of value in the eye of the law that is requested by the promisor as *quid pro quo* for his or her promise and that is either done or promised by the promisee in return for the promise. When it is said that the thing that constitutes the consideration must be valuable, this means just that the substance of the consideration must either impose a legal detriment upon the promisee or confer a legal benefit upon the promisor. The doctrine of consideration explicitly denies any requirement of equivalence between the two sides. Instead, it ensures that the thing promised and the consideration for that promise are "qualitatively different": one thing in return for something *else*. Consideration is sharply distinguished from motive. In keeping with this difference, consideration is something that must "be moving" from the promisee to the promisor, not vice versa,

as would be the case with motive.⁷¹ Whereas the promise must be made before the consideration is given, as the consideration must be something requested by the promisor and done or promised in return for the promise, each side must function as the reason for, and the inducement of, the other; unless the promise and the consideration are *mutually* inducing,⁷² the requirement of consideration is not met.

For the purposes of this paper, I wish to focus on just a few of the main features of the doctrine of consideration. First, let us consider the structure of a promise for consideration and in particular the fact that the consideration must move from the promisee as *quid pro quo* for the promise.

What is meant by saying that, in legal contemplation, the consideration must *move* from the promisee? Negatively, it means that the consideration cannot be the mere reaction to, or the effect of, the promise, as this impacts upon the promisee. For example, the promisee's gratitude or enhanced well-being, even if wanted by the promisor, cannot be consideration, for these are no more than the effect of the promise upon the promisee and so do not move from the promisee. Rather, they are taken in law to move from the promisor. Nor can the consideration be the promisor's motive or purpose for making the promise. This also moves from the promisor, not the promisee. Positively, to move from the promisee, the consideration must be something that *originates with* the promisee and that can be said to be on the promisee's side, apart from any reference to the promise. The promisee gives it up in return for the promise. Something is on the promisee's side if the consideration is under the promisee's control such that the promisee is in a position to enjoy or make use of it before the parties ever interact. In this sense, it belongs to the promisee, not the promisor. When the promisee gives it up, the law views it as moving from him or her.

This requirement that the consideration moves from the promisee ensures that, from the start, promise and consideration represent

71. *Thomas v. Thomas*, [1842] 2 Q.B. 851, 859 (Patteson, J.) ("Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff: it may be some benefit to the defendant, or some detriment to the plaintiff; but at all events it must be moving from the plaintiff.")

72. On this point, see *Wisconsin & Michigan Railway Co. v. Powers*, 191 U.S. 379, 386 (1903) (Holmes, J.).

two sides originating respectively with the two parties, with each of these sides being initially self-subsisting in relation to the other. By contrast, in the case of a gratuitous promise, there is just one side: the promise. Reference to the promisor's motive does not bring into play a second side, but simply elaborates that single side. Moreover, the fact that the promisee may "accept" the promise by expressing delight or satisfaction in reaction to it represents simply the effect of the promise upon the promisee, and so here again the response is properly viewed as moving from the promisor, not the promisee. There is just one side.

The doctrine of consideration requires further that the consideration must be given in response to the promisor's request and as *quid pro quo* for the promise. It is not enough that the promisee's act or promise is reasonably foreseeable to the promisor. It must be reasonably apparent to the promisee that the promisor has requested the consideration as something that he or she wants in return for the promise. In light of this requirement, the consideration is viewed as moving from the promisee *to* the promisor.

In this way, the doctrine specifies a certain kind of relation between the two sides. Since there are two sides and each "moves" something to the other, they can be, and are, "mutually inducing." The reason for the promise is the consideration, and the reason for the consideration is the promise. Each is the cause of, or the "motive" for, the other. Unless each side reasonably appears to the other party as such, any promise will be purely gratuitous. A party's further purposes or motives for requesting or giving the consideration are irrelevant to the legal analysis. Note that if the promise and consideration must be mutually inducing, each is at once cause and effect in relation to the other. Because a cause is temporally prior to its effect, it follows that each side is at once before and after the other—in other words, the temporal dimension is of no consequence. Paralleling the analysis of offer and acceptance, the doctrine of consideration represents the promise and consideration as both temporally successive (the consideration must be in response to the promisor's request) and absolutely co-present (promise and consideration must be mutually inducing).

It is well settled that something can count as consideration if, but *only* if, it either imposes a legal detriment upon the promisee or confers a legal benefit upon the promisor. This further requirement

is framed, of course, by the previous analysis which represents the consideration as something requested by the promisor and as moving from the promisee (whether by a return promise or act) as quid pro quo for the promise. What more do legal detriment and benefit entail? The notion of a legal detriment or benefit refers to the *substance* of the consideration: the *thing* done or promised by the promisee.⁷³ To constitute a legal detriment, the consideration must, when executed, subtract from something that, in legal contemplation, is or can be rightfully under the promisee's control and so something that the promisee can in fact enjoy. This something need not be an external corporeal thing or asset; it can be a permitted course of conduct, the exercise of a right or privilege, the use of one's capacities or skills, and so forth. The consideration imposes a legal detriment if the promisee limits his or her capacity to do as he or she wishes with the thing. Something is a benefit to the promisor if, when executed, it adds to what rightfully is or can be under the promisor's control, allowing the promisor to enjoy the thing and in this way showing that it is something which the promisor can actually want. The fact that the consideration may be a service, the performance of which directly benefits a third party, does not disqualify it as a legal benefit to the promisor. It simply specifies the sort of service which is requested and wanted by the promisor and which is done in fulfillment of his purposes, not those of the promisee or the third party.⁷⁴

The idea of legal detriment or benefit shows the substance of the consideration to be negatively or positively related to a party's wants and to be something in which either party can have an ownership interest. It refers to the fact that the thing done or promised as consideration is something usable; it counts as a good that can reasonably be wanted by the promisee who gives it up and that can reasonably be wanted by the promisor who requests it. Being an object of wants in this way makes the substance of the consideration a thing of value in the eye of the law. As I have already noted, however, the doctrine of consideration does not make reference to a quantitative measure of value and so the idea of

73. Williston emphasizes this point. See Samuel Williston, *Consideration in Bilateral Contracts*, 27 HARV. L. REV. 503 (1914).

74. I develop the implications of this point in Benson, *Should White v. Jones Represent Canadian Law*, *supra* note 16.

comparative value between the promise and the consideration is not any part of the doctrine. Indeed, what the doctrine supposes and requires is *just* the qualitative difference between promise and consideration. The consideration must be something which the promisor reasonably can want, and it is requested "in return for," not as "the equivalent of," the promise. The thing that constitutes the consideration—a qualitatively distinct, usable something—is what is wanted as such; it is not wanted *as* an equivalent. Insofar as the idea of an exchange necessarily includes the notion of equivalence, the aim and role of consideration cannot be, then, to single out exchanges for legal enforcement.

Through the requirement of legal detriment and benefit, the law specifies a conception of want that is suitably detached from the parties' particular motives for wanting each other's things. The question of whether the parties' actual particular interests, whether *ex ante* or *ex post*, are satisfied falls entirely outside the legal analysis of contract. Moreover, since the object of each party's wants is simply the thing done or promised by the other side in return for his or her thing, the conception of wants is framed in terms of their relation and cannot be understood apart from it. Consideration is thus something that can be given and wanted by the parties just in their role as joint participants in a two-sided relation.

This relational conception of wants fits with the idea of the parties' mutual assents being mutually related, voluntary acts: a voluntary interaction. Because giving up a good which the promisee could have used or enjoyed in some other manner is a detriment, it cannot possibly be viewed just as an expression of satisfaction with the promise. It moves from the promisee, not the promisor. Moreover, in giving something up, the promisee *does* something that can meet the other party's promise. It is not merely a reaction to the promise nor the expression of a wish but a deed, no less than the promise made by the other side. We have seen that the objectively ascertainable purpose of the deed is to secure the other party's promise. This is the good that is the reason for incurring the detriment. Because, in general, voluntary conduct is purposive in the sense of being directed toward some good, the promisee's deed is, in this way, voluntary. The same is true of the promise that is made for the sake of the consideration. And given that the particular features of the consideration or the promise do not matter—what

counts is just that they each represent *something* of value—the two voluntary acts are not only mutually related but also absolutely coequal and identical.

A promise for consideration is not just a gratuitous promise with something added to it. It is qualitatively and inherently different. It differs from a gratuitous promise both in form and content by virtue of its being intrinsically and thoroughly two-sided. This marks it as juridical, not merely moral. The doctrine of consideration specifies a conception of object which, being relational, fits within and fills out the framework established by the doctrine of offer and acceptance. The two doctrines work in tandem. I have already suggested how the analysis in terms of offer and acceptance may be understood as a step toward specifying the constituent acts of a transfer of ownership at the moment of agreement. What about the doctrine of consideration?

The idea of a transfer of ownership at contract formation supposes, first, that it must be possible for a promisee to show reasonably that he or she is *doing something as a participant in the formation of the obligation*, not merely in reaction to the promisor's already completed assumption of obligation on the basis of his or her promise alone. The fact that the consideration must be a detriment to the promisee and that it must move from the promisee ensures, negatively, that it is irreducible to an expression of satisfaction with an already completed promise and, positively, that it can function as a return act that meets the act of the promisor. Moreover, if we are to construe the relation between these acts as a transfer of ownership, it must be possible to specify both acts as referring to things that can be subject to one's rightful control. It is precisely this kind of act, we saw, that the doctrine of consideration singles out via the definitions of detriment and benefit, as what must be requested by the promisor to complete the promise.

What entitles us to view these acts as *transferring* ownership? Briefly stated, the answer is that they can be so viewed because the parties themselves, at contract formation, reasonably can understand their acts as having this character. The requirement that the consideration be requested by the promisor and move from the promisee, the definitions of legal benefit and detriment, and the stipulation that the promise and consideration be qualitatively different, together specify at the most elementary and general level

a normative relation which is jointly brought into existence by mutually related acts involving the exercise of ownership. An act that satisfies the doctrine of consideration may reasonably be viewed by the other party in these terms. Consequently, the law may properly hold both parties to this understanding.

While the law does not explicitly present the requirement of consideration in these terms, this meaning is latent in it. In contemplation of law, the consideration forms the substance of the promisor's right that is acquired from the promisee at contract formation. It is the consideration or its value that is protected by the expectation remedy as a principle of compensation. Hence, the law treats it as a protected interest that is given by one party to the other through their mutual assents. Once the consideration has moved at contract formation from the promisee to the promisor in return for the latter's promise, it can no longer be given by the promisee to the promisor in support of some ulterior promise by the latter. The law treats the consideration as already in the promisor's hands, legally speaking, and therefore no longer at the promisee's disposal to move to the promisor. A transfer is presupposed.

There is a final issue that needs to be addressed as part of our discussion of consideration. Consideration implies two distinct sides, two qualitatively different things (constituting the promise and the consideration), and therefore, supposing a transfer between the parties, it views each side as both giving something up and acquiring something else. This is clear in the case of mutual promises. This does not mean, however, that the law is singling out exchanges for enforcement. While exchanges do involve each side alienating and acquiring, as well as two distinct objects transferred, it is important to distinguish between the two-side relation specified by the requirement of consideration and exchanges proper. Any transfer of ownership must, I have emphasized, be two-sided. The juridical definitions of *both* "exchange" and "gift" reflect this crucial prerequisite. In this light, we may say abstractly that a transfer of ownership may be constituted by a transfer of *one* thing from one party to another, with the first party alienating and the second appropriating—this is a "gift"; or, alternatively that a transfer may be constituted by *each* party *both* alienating and appropriating and therefore each transferring something to the other—in which case it is an "exchange." In both kinds of transfers, however, the relation

is, to repeat, constituted by *two* mutually related acts of will. Now my central contention has been that if the parties are to make reasonably clear to each other in and through their interaction that this is what they are unambiguously doing, their interaction must satisfy the requirements of consideration (or an analogous doctrine). The essential role of consideration is to ensure that each party can objectively manifest to the other an assent to terms that makes the latter's co-equal participation necessary for the completion of itself. In this way, the doctrine specifies a content that can function as a transfer of ownership, thereby giving the idea of a transfer of ownership practical reality. That is why *any* transfer of ownership—even the simple one-way transfer from one party to another which I have termed “gift”—must involve two sides and two things. At the same time, because the law does not require that the promise and consideration be equal in value, it allows for transactions that range from a valuable asset for a nominal consideration to full blown exchanges of equivalents. In other words, it is possible for an enforceable agreement to be, in material terms, everything from a gift to an exchange. But it is crucial that even such “gift” transactions be two-sided in the requisite way, and this means that they must involve two sides and two things.

For the purposes of this Essay, I hope that this discussion goes some way toward illustrating how we might draw upon and interpret the legal doctrines of contract formation to specify the mutually related acts that can transfer ownership at the moment of agreement, prior to performance.⁷⁵ I should emphasize that the law itself does not expressly present these doctrines as specifying the constituent acts of a transfer of ownership. Nevertheless, I have tried to show that the idea of a transfer of ownership is latent in the doctrines and, indeed, that it must be so, if the law is to be internally coherent.

We have seen that the doctrine of consideration specifies a *substantive content* that must be promised or done in return for another's promise if the latter is to be enforceable. The expectation

75. The analysis of the assents that transfer ownership requires, in addition, a discussion of the principle of unconscionability. For reasons of space, I cannot do this here. However, elsewhere I have tried to show in some detail how unconscionability, suitably understood, is essential to the analysis of a transfer of ownership. See Benson, *The Unity of Contract Law*, *supra* note 9, at 184-201.

remedy ensures that the person to whom the consideration is given receives it, in the form of damages or specific performance, in accordance with the contractual terms. The consideration, it seems then, constitutes the *object* that is rightfully acquired at contract formation. To complete my discussion of a contractual transfer of ownership, I must address and resolve a theoretical disagreement concerning the character of the object of this transfer. For, as I will now explain, there are two ostensibly very different views as to how it is to be understood.

D. What Does a Contract Transfer?

We have seen that, in contrast to *in rem* ownership rights under first acquisition, the ownership interest that is transferred at contract formation is only between the parties. Following general practice, I will refer to contractual rights as in personam or personal. To fix ideas further, I shall call in rem ownership rights *property* rights. However, as I have already indicated, it is important to underline that, on the view that I am taking, ownership and property are not the same. *Ownership* is a more general conception consisting of *any* right to exclusive possession, use, or alienation of something as against another or others. *Property* is a particular instance of ownership and more precisely a specific form of acquisition. My fundamental thesis is that *contractual rights are also ownership rights*, although in a different way. Whereas property rights are acquired by a unilateral act of will that requires initial physical occupancy of an external corporeal object, contract rights are acquired through the mutually related acts of two parties without the necessity of any physical occupancy. The question that I now address is: What exactly is the object that is acquired by contract? In other words, what is transferred at contract formation, prior to, and independent of, delivery? We must clarify the meaning of the personal right in contract. This question is fundamental to the theory of contract law and to understanding the relationship between property and contract. I shall discuss two possible answers that have been put forward in the philosophical literature. Both approaches take contract to be a transfer of ownership. They differ as to how they view the object of ownership transferred.

The first approach, proposed by Kant,⁷⁶ holds that the other party's *performance* or promise, not the thing promised, is the substance and object of the ownership that is acquired by a contract. To illustrate, suppose I am a party to a contract of purchase and sale of a horse. According to Kant, the object that I acquire by the contract is not at all the horse. My contract right is not with respect to the horse. The horse comes under my right of ownership *only* upon delivery, and then it becomes the object of my *property* right. At contract formation, and therefore prior to delivery, all that I have acquired is the other's "deed, by which that thing [that is, the horse] is brought under my control so that I make it mine."⁷⁷ Kant also expresses this idea by saying that what a party acquires at contract formation is not the thing promised but the promise itself.⁷⁸ On this view, it seems that the relation of rights *between the contracting parties* is one thing at contract formation and something different upon performance.

Kant's answer seems, at first blush, to accord with the legal point of view in that ordinarily it is said that a contract gives a party "a right to performance" against the other, who is under a correlative duty to perform. Moreover, a right to performance can only be understood as a personal right against the promisor. If a third party unintentionally damages the thing promised after the contract has been entered into, but before performance has taken place, the promisor, not the promisee, has standing to sue for the damage.⁷⁹ The promisee can make such a claim only after he or she has taken possession of the thing via delivery. At that point, the promisee acquires title and has the same right with respect to the thing as did the promisor. How can the promisee acquire anything more than a

76. Kant's discussion is in KANT, *supra* note 52, at 402, 424-26. In a recent important article, Ernest Weinrib provides a detailed discussion and defense of this view. He argues that it answers the Fuller and Perdue challenge and that it explains the inaptness of requiring the disgorgement of gains resulting from contract breach as well as the inappropriateness of imposing punitive damages for breach. See Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55 (2003). My discussion of this view draws on both sources.

77. KANT, *supra* note 52, at 424.

78. *Id.*

79. The absence of a claim on the part of the promisee is the basis of the economic loss rule as authoritatively formulated in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927).

right to performance at contract formation if he or she cannot rightfully take the thing prior to delivery?

This view seems to be in tension with the settled and fundamental common law principles of contract formation and contract remedies. It is not the promise itself—as if one could want a promise as such⁸⁰—but rather the substance of the promise—the thing promised—that constitutes the consideration. The consideration is either an asset of some kind (including a right, privilege, etc.) or a service. But both are the thing promised or done, and it is this thing that makes the promise consideration. Contract remedies, by way of specific performance or damages, give the plaintiff respectively a specific thing or the equivalence in money of a thing (whether an external object or a service). In other words, it is nothing other than the substance of the consideration that the law awards the plaintiff by these remedies. In doing this, the law does not, even implicitly, distinguish between the thing promised and the promise itself. Moreover, by treating the thing promised as the plaintiff's protected interest, the law is understood as putting the plaintiff in the position he or she would have been in upon full performance. In legal contemplation, then, performance is viewed as giving the plaintiff no more and no less than the substance of the consideration (and whatever follows from this). Supposing this remedy to be compensatory, the entitlement to the consideration must be acquired at contract formation. Consequently, what the plaintiff rightfully has at formation and what the plaintiff rightfully obtains upon performance must be the same thing; so far as the relation of rights between the parties goes, performance does not, and indeed cannot, add to or in any way modify what is established at contract formation. This, of course, does not settle the different question of the plaintiff's rights vis-à-vis others, either at the moment of agreement or upon performance.

I want to look more closely at Kant's view that the object acquired at contract formation is not the thing promised but the "promise itself"—the other party's "choice." What does this mean? To begin, what one promises must involve an act of some kind (including an omission to act). One cannot promise a state of affairs that does not

80. On this point, see James Barr Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515 (1899).

result from or make reference to one's act of some sort. Promising refers, then, to some exercise of choice. Kant specifies the act that is involved as one that makes the thing promised available to the promisee in such a way that the latter is able to bring it under his or her actual control, thereby making it his or her property. What the promisee must acquire at contract formation is this act by the promisor. This means that the decision to do the act is no longer within the authority and competence of the promisor but rather has been transferred to, and comes under the authority of, the promisee. Now this act is specified with respect to a particular thing and, more precisely, with respect to the promisor's control over it as owner. Thus the act consists in either giving up something to the control of the other party or doing a service that has been requested by the other party. The act must be specified completely and exhaustively in these terms, and it is the act so specified that is no longer at the promisor's option but instead is vested with the other party. The fact that the promisor is *no longer free to do as he wishes* with the thing but has *already* divested himself of this authority in favor of the other party is inconsistent with the promisor continuing to be owner, at least to this extent and vis-à-vis the other party. *As between the parties to the contract*, the promisor has cancelled his or her right of ownership by vesting in the other party rightful possession of his or her act that places the thing under the latter's control. Correlatively, because this act now belongs to the promisee and is exercised on his or her behalf, it is the promisee who qualifies as owner of the thing.⁸¹ This conclusion, it must be emphasized, applies at the point of contract formation. I am arguing, then, that Kant's view that the object transferred is the promise and not the thing promised necessarily implies a change of ownership with respect to the thing as between the parties at formation. The distinction between promise and thing promised cannot be sustained.⁸²

81. Pufendorf seems to endorse a similar line of argument. See 2 PUFENDORF, *supra* note 1, at 606-10.

82. Kant's argument rests upon the possibility of distinguishing thing and act as two different kinds of objects of ownership. His contention that the object of contract is an act and not a thing goes hand in hand with his claim that the object of property is a thing, not an act. See KANT, *supra* note 52, at 404, 424-26. It is this dichotomy that I am questioning. In fact, ownership is always rightful possession, use, or alienation of a thing (which contrasts with a person and may include services as well as corporeal things). In every case, ownership

If the foregoing conclusion is accepted, a different conception of the object of a contractual transfer emerges, one that may be found in the works of Grotius, Pufendorf, and Hegel, to name the most important discussions. According to this conception, at contract formation and therefore prior to delivery, the promisee acquires a right of ownership with respect to the thing as promised. In property, the right of ownership is acquired by a person's unilateral action and the object of the right is defined on this basis. By contrast, in the case of contract, the right and the object are completely specified by the terms of the parties' agreement, and this analysis holds only as between the parties in accordance with those terms. The right is a non-proprietary right of ownership that is *wholly transactional as between the parties alone*.

This thoroughly transactional conception of the right and of the object of ownership makes explicit and completes what is latent in the analysis of property (first acquisition) and a physical transfer. We saw that first acquisition must admit the possibility of non-physical, but rightful, possession of the object of ownership, and that the analysis of acquisition through a physical transfer must allow the possibility of a transactional expression of mutual assents independent of and prior to physical delivery. With contract, the possibility of a wholly transactional construction of acquisition that is prior to physical delivery is made the explicit ground of ownership. Let me elaborate.

In connection with the appropriation by first acquisition, all its requirements and features reflect the fact that, being appropriation of unowned things, it is, and must be, unilateral. From this requirement follow the facts that the object of first acquisition is something

consists in definite modes of conduct that necessarily make reference to a thing. This is as true of property interests unilaterally acquired by occupancy as it is of contractual interests acquired through mutual assents. By the principle of first acquisition, I become an owner by acting in certain ways that are in themselves exercises of ownership, and the content of my right is simply that this capacity to act as owner with respect to the object belongs to me alone; when others deal with the object, their actions no longer count as exercises of ownership. So even in the case of first acquisition, we suppose that the content of ownership must refer to a certain kind of action, viz. asserting control, and a certain kind of object (a thing) over which control is asserted. The same is true of contract, except now the requisite action becomes bilateral and consensual. Every difference between these two forms of acquisition stems from the fact that one is unilateral whereas the other is transactional. As I discuss below, *infra* pp. 1728-29, contract can have as its object services as well as things (in the narrow sense) because of its transactional character.

corporeal and separate from persons and that the only way individuals can demonstrate that they have brought something under their effective control is by occupying it physically. Thus, the time and manner of occupancy are determined by an individual's unilateral decision, the ways and means at his or her disposal, the particular features of the object in the existing circumstances at any given time, and so forth. Moreover, occupancy requires that persons actually do something to or with the object. In other words, they can only appropriate the thing by actually using it. The conceptually distinct aspects of taking possession and use are initially undifferentiated. And because this appropriation is unilateral, the fact that the normative meaning of occupancy lies in its relation to others remains merely implicit.

Acquisition by physical transfer differs to the extent that occupancy by one person alone is no longer sufficient: acquisition results from the combined acts of two parties. The unilateral decision to take possession of an unowned external object becomes here mutually related decisions to alienate and take physical possession. Unless the physical movements of giving over and taking count normatively as alienation and appropriation, ownership is not transferred. The implicitly relational character of taking possession by occupancy thus becomes explicit in the fact of these mutually related assents being expressed in the physical transfer. Yet, in the case of a physical transfer, it is not fully transactional even in its own terms. The time and manner of delivery are determined by the happenstance of *if and when* one party unilaterally decides to make the thing available to the other and the latter unilaterally decides to take it. Although it is the parties' mutually related assents that allow this happenstance to have legal effect, the parties do not *make* this factor the basis of delivery. It is thus only through physical delivery that their assents have legal effect, whereas, in reality, it is their assents that give delivery legal significance. And while here alienation and appropriation are differentiated by the two sides of the transfer, neither is distinguished from actual use because of the dependence of the transfer on physical delivery. If the transactional character of a physical transfer is to be brought out fully, delivery must be explicitly subordinated to the parties' mutual assents and, in this way, be

wholly determined transactionally. This is achieved in contractual relations.

At the moment of agreement and in accordance with its terms, what one party transfers to the other is the exclusive authority to exercise control over the thing promised (whether the thing is an external object or a service).⁸³ This is what the promisor gives up and what the promisee takes. This exclusive authority to exercise control over a thing *is* ownership. Because ownership is the same however differently it may be exercised, and irrespective of the different purposes and interests involved in its exercise, the ownership that is acquired is identical to the ownership that is given up; hence the propriety of referring to it as a *transfer* of ownership. Now, the exercise of ownership, whether appropriating, using, or alienating, necessarily takes place at a particular time and in a particular manner. We have already seen how these modalities are determined in the cases of first acquisition and physical transfer. In contract, they are determined by the parties' assents, in keeping with the thoroughly transactional character of the transfer. Moreover, appropriation and alienation are now each explicitly distinguished from use. The agreement transfers rightful control over the thing (object or service) from one party (alienation) to the other (appropriation), and, by stipulating performance, it determines the time and manner of the promisee's physically taking it (use).

What is the meaning and role of performance in contract? In general terms, it ensures that something is made actually available to the promisee so that he or she can rightfully use it at will. The moment and manner of delivery are defined exactly and completely as a stipulated performance in accordance with the basis of rights (namely, the parties' mutual assents) and therefore in a way that reflects the primacy of right. It is important to note here that "delivery" need not require any positive act or service by the promisor. It may simply involve the promisor refraining from doing something to the thing. Indeed, the promisee may already have physical possession of it so that he or she need not do anything more to take it physically. The content of performance depends entirely on the terms of the agreement as applied in the particular circum-

83. I discuss service contracts *infra* at pp. 1728-29.

stances. I have tried to emphasize that in the case of a contractual transfer, as opposed to a physical transfer, delivery does not alienate ownership. Whether performance consists in a positive act or an omission, it never represents an exercise of ownership of any kind by the promisor. The promisor does not act as an owner precisely because their agreement has already vested ownership in the promisee. Accordingly, the promisor is prohibited from the moment of contract formation from doing anything that interferes with delivery as determined by the agreed-upon terms. It is true that if the promisor is in physical possession of the thing, the promisor may do with it as he or she wishes so long as this does not affect the thing in a way incompatible with the contract's express or implied terms. Within these parameters, the promisor retains a liberty, vis-à-vis the promisee, to do as he or she wishes. But this liberty is not defined apart from the contract. Indeed, the better view is that the liberty is implicitly authorized by the parties' agreement and hence is absolutely subordinated to it. It is not delivery but rather the acts that constitute the agreement that alienate ownership. In contract, the juridical meaning of delivery is simply that the promisor has *not* acted incompatibly with the promisee's protected interest.⁸⁴ When via delivery the promisee physically takes the thing promised under the terms of their agreement, he or she does so *already as* owner. This is, juridically speaking, the central point and key to everything.

The right acquired at contract formation is a right of ownership and therefore includes all the incidents of ownership: the right to possess, use, and alienate. The fact that these are now trans-

84. Pufendorf states:

For after a pact is completed, or after a right has been transferred by a pact to another, the thing at once begins to belong to another and to serve his desire, while the alienator can legitimately commit no act regarding it save such as tends to give possession to another. If he does anything further touching that thing before the delivery of possession, he does it *de facto* and not as though from any right of possession. Indeed, delivery of possession itself is not, properly speaking, the final act of dominion, but an abdication of physical retention. For that is held an act of dominion which is exercised freely from the power of dominion, while delivery of possession does not take place freely but of necessity, or because of an obligation

PUFENDORF, *supra* note 1, at 610.

actionally defined is reflected in the different remedies that are available to the promisee for breach of contract.

First, breach of contract can injure a promisee's right to possess the thing as promised, just as trespass infringes proprietary possession. In both, nominal damages are available to vindicate the protected interest in sheer possession. Second, contract gives the promisee a protected interest not just in possession but also in using the promised thing. This is reflected in the availability of recovery for so-called consequential loss under the rule in *Hadley v. Baxendale*.⁸⁵ The promisee can recover for loss sustained by not being able to put the thing to intended uses. But whether and what the promisee can recover is decided by what the parties could reasonably have contemplated at the time of contract formation. Unless the lost use satisfied this criterion, it is contractually irrelevant. The standpoint is thoroughly transactional. Finally, a promisee's protected interest in alienating the thing promised is reflected in the basic remedies of expectation damages and specific performance. These serve the role of assuring that the promisee receives the value of the thing promised. Value, for legal purposes, may be twofold: it may be the value of a commodity or the value of a unique thing for which there is no substitute. Whether it is one or the other is decided by the parties' intentions and interests as manifested in their mutual assents, reasonably interpreted, at contract formation. One considers their agreement in the particular context of their interaction. Where it is concluded that the parties reasonably intended value to be that of a commodity, the remedy is expectation damages. Specific performance is available to ensure the promisee receives the value of a unique thing. Here again, the ownership interest is determined transactionally.

To conclude this discussion about the object of a contractual transfer of ownership—and with this, my account of contract as a transfer of ownership—I want briefly to deal with three different scenarios that might be thought to present difficulties for the proposed analysis. While my elucidation of the object of a transfer of ownership may seem at least plausible where the object is a specified, unique, external (corporeal) thing, this, it may be objected, is not so where the “object” is a service or something which a party

85. 156 Eng. Rep. 145 (Ex. 1854).

does not yet own, or it is not yet determined at contract formation which specific thing, among a number of practically identical items, will be delivered in fulfillment of the contract.⁸⁶ Clearly, any account of the object of a contractual transfer has to apply to these scenarios. I want to suggest why they do not challenge the proposed analysis. Showing this will also clarify the meaning and scope of the object in contract.

My brief answer is that it is precisely in virtue of the transactional basis and character of a contractual transfer that the definition of the object can encompass these three scenarios and more.⁸⁷ Let me explain.

In a service contract, one party externalizes his or her powers in a definite, limited mode and form, and this limited externalized power is the object transferred to the second party.⁸⁸ The first thing to note is that this is possible only with the first party's consent. The power that is externalized is part of, and belongs to, the party under his or her right of personal (physical and psychological) integrity and so is not immediately something external that can be appropriated by anyone else. This cannot be an object of first acquisition. It only becomes a possible object of ownership in fully consensual, that is, transactional, acquisition. Moreover, *taken as a whole*, these powers *are* the person. As a whole, they cannot be alienated without

86. I wish to thank my research assistant, Fredrick Schumann, for identifying, and pointing me to, these three scenarios as well as for showing why I must explain them. He provided his own explanation which I found interesting and helpful.

87. In his article, *Punishment and Disgorgement as Contract Remedies*, *supra* note 75, Ernest Weinrib argues that Kant's view precludes disgorgement of gains resulting from contract breach in all cases, because the basis of this exclusion is the categorical difference Kant draws between property and contract rights. This unqualified denial of the availability of gain-based damages is in tension with recent, and widely endorsed, developments in the common law of contract. For example, where specific performance would be ordered for breach of a contract of sale of land, courts may compel a defendant who sells the land to a third party at a higher price to disgorge the gain. Kant's differentiation of property and contract cannot readily explain this sort of exception to the general rule against disgorgement. In a recent article, I have tried to show how, on the transactional view proposed here, both the general rule against disgorgement and these sorts of exceptions can be justified. See Peter Benson, *Disgorgement for Breach of Contract and Corrective Justice: An Analysis in Outline*, in UNDERSTANDING UNJUST ENRICHMENT 311 (Jason W. Neyers, Mitchell McInnes, & Stephen G.A. Pitel eds., 2004).

88. My discussion of service contracts draws on Hegel's systematic account which remains, in my view, the most instructive in the philosophical literature. See, his *Philosophy of Right*, *supra* note 62, paras. 40, 43, 66-67, 80.

alienating the person himself or herself, which is morally impossible. If they are to be appropriated, they must be externalized in a *qualitatively and quantitatively limited form*: a definite work or service that is now distinct from the totality of the person's powers. If, as I have supposed, the notion of a thing is understood in legal normative terms primarily through its contrast with that of a person, the service *is* a thing that can be owned by another. Because the authority to control (possess, use, or alienate) this thing may be conceived apart from the particular purposes, needs, or interests of those exercising control, it is the same ownership interest in all its manifestations. In sum, ownership in a service can be transferred from one person to another.

Thus there can be service contracts and wage-labor contracts in addition to contracts for the purchase and sale of a specified external corporeal thing. The analysis of a contractual transfer of ownership as set out in this section applies to both in the same way. At contract formation, one party acquires ownership of the other's service and through performance obtains actual use of it. To say that the first party acquires ownership of the other party's service means simply that the latter has transferred to the former the authority to determine his or her action or to express his or her power in the limited way stipulated by their agreement. The second party no longer has rightful control over this part of his or her externalized power, which has vested in the first at contract formation. It is this transferred *control* which, as always, constitutes the *ownership* transferred and which is the protected interest vindicated by the expectation remedy.⁸⁹

As for the second scenario—where, for example, *A* contracts with *B* to sell *B* a horse that *A* does not yet own—the appropriate analysis depends upon how their agreement should reasonably be interpreted. One possibility is that the parties reasonably understand that *A* is promising a horse which he presents in effect as already his own, whether or not he actually owns it. *A* has taken on the entire risk that he may not be able to get the horse with the consequence that he will not be able to perform as promised. So far

89. Depending upon circumstances, the only available expectation remedy may be expectation damages if, for reasons of policy, courts decline to order specific performance for a service contract.

as the parties' contractual relation goes, *A does* own the horse. A second possibility is that the parties reasonably take *A* to be promising to procure the horse and, having obtained it, to sell it to *B*. *A's* promise to procure the horse is determined and qualified in accordance with express and implied terms of their agreement. It amounts to the promise of a service. The contract does not contemplate that *A* owns the horse without qualifications or conditions. The promise to transfer the horse is conditioned by the promise to procure it. Both elements of the contract—the service and the sale—come within the scope of a contractual transfer of ownership. It is the transactional basis of contractual acquisition that explains how the second scenario fits with the analysis of a transfer of ownership.

In the third scenario, *A* has a number of practically identical items and contracts to sell one of these to *B* without specifying which one. According to the transfer of ownership model, *A* has transferred ownership over one of these items to *B* and, as between the parties, *B* is now the owner of an item. But which one? Because, *ex hypothesi*, any of the items will satisfy the contract, *B* cannot say that *A's* obligation is to hand over a particular one. Nor does *A* act inconsistently with the contractual obligation if he sells any particular item to a third party. Nevertheless, the contract contemplates the transfer of something which is identifiable and determinable. At formation, *B* acquires ownership of "one of *A's* items, having *x* characteristics and *y* value." When *A* hands over one of these items, he does nothing more than give *B* physical possession and use of the very thing promised. *A* breaches the contract if he is not willing or able to hand over one of the items. The fact that an object is not unique does not therefore make it indeterminate and so unidentifiable. So long as it is possible for the parties reasonably to determine at the point of contract formation what will count as performance, they have necessarily specified the object of the transfer and therefore the thing owned that is alienated by one and acquired by the other. This extension of the scope of the object is made possible by the consensual basis of the acquisition. It is not a possible object of property acquisition (under the principle of first occupancy). Here again, the transactional character of contractual acquisition is the deciding factor. Consent, understood as the

mutual assents that transfer ownership, is the whole foundation of contract.⁹⁰

90. The complete argument for this claim requires that we show how all the significant doctrines and principles of contract law fit within this conception. That task goes beyond the purposes of this Essay. For a discussion of the doctrines of mistake and frustration along these lines, see Benson, *Public Basis of Justification*, *supra* note 17, at 326-34.