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Contract as Transfer of Ownership, Even Without Consideration

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Abstract

Functionalist justifications for the consideration requirement, and the many criticisms of them, are well developed in the literature. But Peter Benson offers a different sort of justification. He argues that contracts are transfers of ownership, and he builds his transfer theory around the consideration requirement. He claims that a bilateral and mutual act is required for ownership to be transferred. Therefore, he argues that consideration is a central part of what a contract inherently is because it works to ensure that there is a bilateral and mutual relationship between the parties. In this article, I challenge this view. I accept for the sake of argument that contracts are transfers of ownership and that they must be bilateral and mutual acts. However, I argue that a sufficiently bilateral relationship can be established, even without consideration, through the acts of offer and acceptance. In doing so, I demonstrate that it is not necessary to view the doctrines of offer, acceptance, and consideration as being inextricably linked as Benson does. Moreover, drawing on insights from the civil law tradition, I show that a relationship of mutuality can be established in contracts that are not backed by consideration. Since I demonstrate that contracts can be seen as transfers of ownership even without consideration, I argue that the bulk of Benson's transfer theory could remain intact if the consideration requirement were to be removed. Finally, I argue that, in light of recent developments in many common law jurisdictions, Benson's transfer theory must be understood without the consideration requirement in order for it to withstand the test of time.

Introduction

Scholars in the common law tradition have articulated many theoretical justifications for the consideration requirement. Most of these justifications could be called 'functionalist' because they focus on the functions that the consideration requirement ought to serve. Many are familiar with Lon Fuller's claim that the consideration requirement, as one type of legal formality, serves evidentiary, cautionary, and channelling functions.[1] Others have argued that the consideration requirement ensures that contracts have sufficient economic value[2] or even that it ensures that the social domain is not tainted.[3] These functionalist justifications have been subject to a steady stream of criticism. Many have argued that they do not actually justify the continued existence of the consideration requirement. For example, Charles Fried memorably called the consideration requirement, when understood

1. See Lon L Fuller, "Consideration and Form" (1941) 41:5 Colum L Rev 799.
2. See Claude Bufnoir, *Propriété et contrat: théorie des modes d'acquisition des droits réels et des sources des obligations*, 2d ed (Librairie Arthur Rousseau, 1924).
3. See Mindy Chen-Wishart, "In Defence of Consideration" (2013) 13:1 OUCLJ 209.

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as a formality in Fuller's sense, "a rather awkward tool, which has the [virtue] of being able to pound nails, drive screws, pry open cans, although it does none of these things well and although each of them might be done much better by a specialized tool."[4] In a pair of recent articles, Fabien Gélinas and I build on some existing criticisms of the functionalist justifications. We argue that the consideration requirement has outlived its purpose, and that it often causes more harm than good, in Canada[5] and in other common law jurisdictions.[6]

However, Peter Benson offers a different sort of justification, one that has perhaps not received enough attention from those of us that have argued that the consideration requirement should be abolished.[7] In his recently published book, *Justice in Transactions,* and in some of his earlier work, Benson places the consideration requirement at the heart of his account of what a contract inherently is.[8] He does this instead of only focusing on the functions that the consideration requirement might serve. For Benson, the consideration requirement is justified not because it promotes fairness, economic efficiency, or some other instrumental end, but because a contract simply cannot exist without it.

According to Benson, a contract is "a transfer of ownership between the parties"[9] that is "complete at contract formation."[10] In his view, performance becomes the "normative consequence, not the object, of the promisee's base

4. Charles Fried, *Contract as Promise: A Theory of Contractual Obligation*, 2d ed (Oxford University Press, 2015) at 39.
5. See Fabien Gélinas & Zackary Goldford, "Rethinking Consideration in Contract Law: Could We Just Do Without It?" (2021) 65 Can Bus LJ 219.
6. See Fabien Gélinas & Zackary Goldford, "More Than a Side-Wind: Rethinking the Consideration Requirement in Commonwealth Contract Law" OUCLJ [forthcoming in 2022] DOI: 10.1080/14729342.2021.2008137. See also FMB Reynolds & GH Treitel, "Consideration for the Modification of Contracts" (1965) 7:1 Mal L Rev 1; Mark B Wessman, "Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration" (1993) 48:1 U Miami L Rev 45 [Wessman, "Fire the Gatekeeper"]; Mark B Wessman, "Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration" (1996) 29:2 Loy LA L Rev 713; Alan M White, "Stop Teaching Consideration" (2020) 20:2 Nevada LJ 503; Wright, "Ought the Doctrine of Consideration to Be Abolished from the Common Law?" (1936) 49:8 Harv L Rev 1225.
7. In our article that focuses on the consideration requirement in Canada, Gélinas and I claim that "Benson's account, like any account claiming a distinct role for consideration at the heart of contract law that cannot be replaced by other tools, places the consideration requirement on a higher pedestal than do the cases . . . in which the consideration requirement served as a stand-in for a legal tool that had yet to be developed, such as economic duress." Gélinas & Goldford, *supra* note 5 at 225. Even if we are right to assert that the cases that we discuss reveal that functionalist justifications are best placed to explain the consideration requirement, Benson's transfer theory deserves attention, if for any reason because it offers a comprehensive theory of contract law that challenges us to think beyond the theories that have been developed and defended over many decades. And if we take Benson's work as seriously as we ought to, the argument that Gélinas and I advance is vulnerable to criticism because we pass over a significant account—perhaps the most comprehensive and persuasive one that emerged in recent scholarship—of the importance of the consideration requirement. Our argument will be made more persuasive if it can be shown that, in addition to not living up to functionalist justifications, the consideration requirement need not be regarded as something that is inherent to what a contract is even if we accept much of Benson's transfer theory.
8. See Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Harvard University Press, 2019) [*Justice in Transactions*].
9. *Ibid* at 21.
10. *Ibid* at 41.

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entitlement at formation."[11] As he argues in some of his earlier work, performance "adds nothing new but is just the fulfillment of the rights and duties established at contract formation."[12] Failure to perform is akin to conversion because it is a deprivation of the creditor's property by the debtor.[13]

Benson argues that a transfer of ownership requires the "coequal active participation"[14] of each of the parties, which I refer to as 'bilaterality,' coupled with a degree of substantive fairness, which I refer to as 'mutuality.' He claims that, prior to performance, only the consideration requirement can ensure that there is a relationship of bilaterality. Moreover, the consideration requirement makes it possible for a relationship of mutuality to be established. Once "the possibility … of a genuinely two-sided contractual promissory relation" is established through the consideration requirement, "unconscionability tests [the apparent contract] to see whether [it] can reasonably count as between the parties as genuine equivalents or, if not, whether the nonequivalence may be explained on the basis of donative intent or assumption of risk."[15] Since Benson claims that a bilateral and mutual relationship cannot be established prior to performance without consideration, he asserts that contracts must be distinguished from transfers of ownership that do not require consideration.

As Benson notes, and as is well established in property law,[16] gifts only result in transfers of ownership when they are delivered to their recipients. Like contracts, they create a "two-sided nexus between the parties"[17] through delivery and receipt, but they are not contracts by Benson's account because no transfer of ownership occurs until there is also a transfer of possession. Benson also claims that unilateral promises—which lack the give-and-take "relation required by the doctrine of consideration"[18]—do not result in transfers of ownership prior to performance because "there cannot be a contractually effective or even recognizable acceptance of gratuitous promises" without consideration.[19] Further, Benson claims that while reliance can lead to the creation of obligations, these obligations cannot be "properly called contractual"[20] because they create "a kind of relation and a type of protected interest that are genuinely distinct from"[21] contracts, in large part because they are not backed by consideration. Instead, he views reliance-based obligations as "a form of negligence,"[22] or liability that arises due to one party's fault. Therefore, "the plaintiff's protected interest is with respect to a position that she could and would have occupied independently

11. *Ibid* at 323.
12. Peter Benson, "Contract as a Transfer of Ownership" (2007) 48:5 Wm & Mary L Rev 1673 at 1674.
13. See Benson, *supra* note 8 at 251.
14. *Ibid* at 102.
15. *Ibid* at 321.
16. See e.g. Bruce Ziff, *Principles of Property Law*, 7th ed (Thomson Reuters, 2018) at 183-87.
17. Benson, *supra* note 8 at 63.
18. *Ibid* at 36.
19. *Ibid* at 38.
20. *Ibid* at 40.
21. *Ibid* at 70.
22. *Ibid* at 73.

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of her interaction with the defendant," meaning that it "does not give the plaintiff a new entitlement" as would a contract.[23] Overall, Benson argues that "consideration itself establishes and represents a particular kind of relation between the parties,"[24] one that is "genuinely and completely bilateral or two-sided."[25] Only such a relationship independently results in a transfer of ownership and can thus be regarded as a contract.

In this article, I engage with Benson's transfer theory. In doing so, I accept for the sake of argument that contracts are, as Benson proposes, vehicles through which ownership is transferred. I also accept, again for the sake of argument, that a transfer of ownership requires that there be a relationship of bilaterality and mutuality between the parties.[26] However, I argue that ownership can still be seen as being transferred, even in Benson's sense, by offers that are accepted, because as I demonstrate, this is sufficient to create a bilateral relationship between the parties. In doing so, I challenge Benson's assumption that the three traditional requirements for the formation of a contract without formalities at common law—offer, acceptance, and consideration—"must necessarily function in tandem with each other as mutually supporting parts of a unified conception."[27] Then, drawing on ideas from the civil law tradition, I show how relationships of mutuality can be formed even if something tangible that would count as consideration in the common law tradition is not passed to one party. Therefore, I argue that Benson's transfer theory could be understood—and after some adjustments, remain mostly intact—without the consideration requirement. Finally, I argue that Benson's transfer theory should be understood in this way because the consideration requirement, at least in its traditional form, has been chipped away by courts in various common law jurisdictions. Since Benson's transfer theory is an attempt to make sense of the positive law, if it is to withstand the test of time, it must be capable of standing on its own two feet without support from the consideration requirement.

Transfers of Ownership by Offer and Acceptance, Even Without Consideration

Offers, Acceptances, and Bilaterality

Even if we accept, as Benson does, that a transfer of ownership requires a bilateral act, it does not follow that consideration is required to form a contract. As Benson

23. *Ibid* at 74.
24. *Ibid* at 42.
25. *Ibid* at 46.
26. This is a point that others have challenged. Nick Sage wrote that "there is no obvious connection between consideration and the idea (even the pure idea) of a property-like transfer of control. . . . Why, in order for me to transfer control of something to you, must you give me something back?" Nick Sage, "On Justice in Transactions" (2021) 84:4 Mod L Rev 898 at 905. Sage also wrote that "Even assuming that a consideration-supplying promisee is somehow more actively participatory, it remains unclear why that precise level, or kind, of mutual participation should be required for a property-like transfer." *Ibid*.
27. Benson, *supra* note 8 at 38.

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notes, "the view that contract is consensual and bilateral has guided common law thinking about contract law since the fourteenth century, if not before."[28] Although 'formal' contracts—covenants made in deeds—could be, and still can be, unilateral acts in the sense that they need not be backed by consideration,[29] as David Ibbetson notes, contracts formed without formalities "[require] not simply a voluntary act but an agreement between the parties."[30] Historically, bilateral agreement could be manifested through a variety of words or actions which indicate that an offeree intends to accept an offer. Of course, for some time, the requirement for bilaterality could only be met through the consideration requirement because the doctrines of offer and acceptance emerged after the doctrine of consideration was created.[31] But ever since the law has recognized the doctrines of offer and acceptance, it has been the case that bilateral agreement can be manifested in other ways, such as by shaking hands or even by enjoying drinks together.[32] Broadly speaking, this continues to be true, and there is now a well-developed body of law that governs offers and acceptances. Overall, contracts cannot be formed without two actions which, taken together, are "consensual and bilateral," to borrow Benson's words: an offer by one party, and unequivocal acceptance of that offer by the other party.[33]

Although it is indeed "trite law"[34] that contracts must be backed by consideration even if there is an offer that is accepted, contracts that are not backed by consideration can nevertheless be bilateral acts since they cannot be formed without the consent of both parties. Thus, contracts that are not backed by consideration are akin to other bilateral acts that, in Benson's view, result in an effective transfer of ownership, especially executed gifts. As discussed above, ownership is transferred when a gift is delivered to and accepted by its recipient, the result of which is an "externally manifested act with the requisite intent" to transfer ownership.[35] According to Benson, "the two-sided nexus between the parties is accomplished first and foremost by delivery," when "the donee can be presumed to have accepted unless he indicates differently."[36] This form of acceptance—manifested through the recipient's act of taking possession of the gift—is just one way of establishing the sort of bilaterality that is required for ownership to be transferred. Other actions which indicate that one accepts an

28. *Ibid* at 35.
29. However, as Alan Brudner notes, "promises under seal are enforced not as executory promises but as executed gifts . . . . Thus, the seal is not an alternative to consideration in triggering the enforcement of a promise; rather it is something that (along with delivery) transforms a promise into an executed transfer." Alan Brudner, "Reconstructing Contracts" (1993) 43:1 UTLJ 1 at 35.
30. David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 2001) at 73.
31. See Benson, *supra* note 8 at 103.
32. See Ibbetson, *supra* note 30 at 73-74. See also Morris R Cohen, "The Basis of Contract" (1933) 46:4 Harv L Rev 553 at 582-83.
33. Benson, *supra* note 8 at 35.
34. *Ibid* at 48.
35. *Ibid* at 59.
36. *Ibid* at 63.

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offer, such as shaking hands or sharing drinks even before any transfer of possession occurs, could also be seen as reciprocal actions that make a relationship bilateral in a way that is analogous to taking possession of a gift that has been delivered. Each of these ways of manifesting bilateral assent could be seen as sufficient to establish a relationship that is "fully two-sided, equally active, and reciprocal contributions of both parties."[37] One party offers something and the other party accepts it. To borrow Benson's words from another context, "the source of the obligation is in two manifestations of will, not one."[38]

Benson would probably respond that it is a mistake to regard physical delivery of a gift and acceptance of an offer as analogous. He would claim that delivery goes further than acceptance of an offer because it results in an instantaneous and irrevocable transfer of ownership or, put otherwise, "a *present and exhaustive* transfer of control from donor to donee."[39] By contrast, the acts of offer and acceptance alone do not, as a matter of positive law, have this effect because these acts merely express the parties' future intentions, and "expressing a commitment to transfer ownership *in the future* . . . [leads to] no present transfer at all."[40] But Benson's claim, which attempts to describe the positive law, could only be persuasive if courts are unwilling to give effect to contracts that are not backed by consideration. We would need to accept, as Benson does, that "in the absence of delivery, the law treats a party's words of giving as a mere promise to give, which, if unsupported by consideration, produces no legal effects."[41] Yet, if courts are willing to recognize that ownership can be transferred without consideration and without delivery, one party's offer to give something to the other, so long as it is met with acceptance, would indeed result in a present transfer of ownership in Benson's sense because the offeror would be bound to perform. Thus, the distinction that Benson draws between executed gifts and contracts that are not backed by consideration would break down if it can be shown that the consideration requirement is being hollowed away. Later, I will demonstrate that this is the case. Since courts—at least in some common law jurisdictions—have been willing to recognize that contracts can be formed, or at least modified, without consideration, it is hard to see a difference between those contracts and executed gifts. In both cases, courts give effect to transfers of ownership. And in both cases, there is some sort of bilaterality between the parties that is manifested through actions that each of them takes; one party makes an offer, and the other accepts it.

Yet, Benson would not agree that an offer met with acceptance is a sufficiently "consensual and bilateral"[42] act that would result in a transfer of ownership.[43]

37. *Ibid* at 60.
38. Benson, *supra* note 12 at 1708.
39. Peter Benson, "The Idea of Consideration" (2011) 61:2 UTLJ 241 at 259 [emphasis in original].
40. *Ibid* at 206 [emphasis in original].
41. *Ibid* at 262.
42. Benson, *supra* note 8 at 35.
43. *Ibid* at 109-10.

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Doing so, he argues, would "break the widely assumed connection between the requirement of offer and acceptance and that of consideration as the twin pillars of contract formation."[44] As he notes, the doctrines of offer and acceptance "[work] in tandem" with consideration, therefore "an offer that does not state a promise-for-consideration is simply not an offer."[45] In fact, Benson goes so far as to write that the passing of consideration "is itself the acceptance of what is moved to him or her by the other side," and therefore acceptance "is not reducible to a mere reaction to an already completed promissory act of the other."[46] It is for this reason that the act of expressing one's desire to accept an offer alone cannot, in Benson's view, give rise to a relationship that is sufficiently bilateral for ownership to be transferred.[47] An apparent act of acceptance cannot actually be an acceptance, in the sense that it does not have legal effect, unless consideration is in the mix.[48] This is why Benson says that there is a conceptual link between acceptance and the consideration requirement.

In essence, Benson claims that consideration is required because the law requires it. At first blush, this argument might seem tautological, although this would not itself be problematic because Benson's transfer theory is designed to offer an interpretive account of the positive law. That said, it suffices to say that his argument could only be persuasive if courts did not recognize acceptances without consideration as being sufficient to cause the creation of a contract. But if an act of acceptance can constitute a valid acceptance without consideration—which, as I will show later, is at least arguably the state of the law today in some jurisdictions—one could imagine that Benson might view the act of acceptance alone as sufficient to create a relationship of bilaterality that results in a transfer of ownership. It would not be true to say that an offer without consideration is "simply not an offer"[49] or an acceptance of an offer without consideration is simply not an acceptance. Indeed, acceptance alone, even without consideration, would be the only way to establish a relationship of bilaterality through a contract. Yet, Benson does not think that this is the state of the law. Rather, in his view, offer, acceptance, and consideration work together to create a relationship that is "robustly bilateral, in the sense of being made not

44. *Ibid* at 36.
45. *Ibid*.
46. *Ibid* at 61.
47. In order for offers and acceptances to have legal effect, it must be the case, according to Benson, that "I have placed my promise, as a promise, beyond my control because it is specified in terms of something that you must do to make it a promise." Benson, *supra* note 39 at 262. An offer is beyond the control of the offeror once it is accepted since, at the moment of acceptance, a contract is formed. Moreover, since acceptance must conform to the terms of the offer, it is fair to say that an offer, even without consideration, can be "beyond my control because it is specified in terms of something that you must do to make it a promise." *Ibid*.
48. As Benson wrote in some of his earlier work, "to count as two-sided, the acceptance *must* reasonably and unequivocally appear as an independent act in return for the promise and not merely a reaction to or an aspect of it." Acceptances alone are not sufficient to constitute an independent act, according to Benson, because they "can reasonably be viewed just as a reaction to the promise." Benson, *supra* note 39 at 263 [emphasis in original].
49. Benson, *supra* note 8 at 36.

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just for or to a promisee but also with her coequal active participation,"[50] and without consideration, what would otherwise count as offers met with acceptances cannot "make the promisee identically and equally the co-author of" a contract.[51]

It is not necessary to see the doctrines of offer, acceptance, and consideration as inextricably linked, or as C.J. Hamson put it, as "an indivisible trinity."[52] Benson's assertion that an offer is "simply not an offer"[53] unless it contains a proposal for the passing of consideration between the parties sits uneasily with the way that courts often understand the link between offers and consideration (if there is one at all). While it is true that the consideration requirement, to the extent that courts adhere to it, makes it such that an offer must contain some proposal for the passing of consideration in order for it to be able to form a valid contract should it be accepted (otherwise, the apparent contract would not be backed by consideration), this is merely a practical consequence of the consideration requirement rather than a defining feature of what an offer is. Thus, it is not the case, as Marcus Roberts has suggested, that "offer and acceptance ... would have to be rethought" if the consideration requirement were to be abolished.[54]

Many courts have often had little trouble recognizing offers and acceptances even if a contract was not validly formed because the consideration requirement was not met. Consider, for example, the classic American case of *Alaska Packers' Association v Domenico*,[55] which follows a similar fact pattern as the classic English case of *Stilk v Myrick*[56] and some other cases from across the common law world.[57] A group of fishers demanded a significant pay increase after it was too late for their employer to hire replacements, and the employer agreed to the proposed modification. Judge Ross, writing for the Court, recognized that there was an "alleged contract" that modified the initial agreement, however "the real [question] in the case" was whether it was "supported by a sufficient consideration."[58] Judge Ross went so far as to recognize that there was "consent" for the modification, which is not a difficult conclusion to reach because the fishers made an offer that the employer accepted. However, this was insufficient to form a contract because it lacked consideration "for the reason that it was based solely upon the libelants' agreement to render the exact services, and none other, that they were already under contract to render."[59] Likewise, in *Stilk*, the parties had "entered into an agreement"[60] to modify the initial

50. *Ibid* at 102.
51. *Ibid* at 110.
52. CJ Hamson, "The Reform of Consideration" (1938) 54:2 Law Q Rev 233 at 234.
53. Benson, *supra* note 8 at 36.
54. Marcus Roberts, "Variation contracts in Australia and New Zealand: whither consideration?" (2017) 17:2 OUCLJ 238 at 259.
55. 117 F 99 (9th Cir 1902) [*Alaska Packers*].
56. [1809] EWHC KB J58, 170 ER 1168 [*Stilk*].
57. See generally Gélinas & Goldford, *supra* note 5; Gélinas & Goldford, *supra* note 6.
58. *Alaska Packers*, *supra* note 55 at 102.
59. *Ibid*.
60. *Stilk*, *supra* note 56.

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contract, but this agreement did not have legal effect simply because it lacked fresh consideration. Of course, judges have sometimes conflated the doctrine of consideration with the notions of bilaterality and mutuality. For example, in the American case of *Miami Coca-Cola Bottling Co v Orange Crush Co*,[61] Judge Bryan, writing for the Court, held that "the contract was void for lack of mutuality" because it was not backed by consideration.[62] However, he recognized that the parties had reached an agreement that each had consented to and, had that agreement been backed by consideration, it would have been a contract. Therefore, the offer was no less of an offer, and the acceptance was no less of an acceptance, even though there was no consideration.

Perhaps even more tellingly, courts that have found it fitting to depart from the consideration requirement (at least in part) did not have trouble finding that there were valid offers and acceptances that did not involve consideration. For example, in the Canadian case of *Rosas v Toca*,[63] the Court of Appeal for British Columbia held that a contract could be validly modified without fresh consideration "absent duress, unconscionability, or other public policy concerns."[64] In that case, Rosas loaned money to her (now former) friend Toca, who offered to repay the loan later than provided for in the initial contract several times. Rosas accepted each of these offers to modify the contract. There was no question that these offers to modify the contract were not backed by fresh consideration; Rosas received nothing in return for them. But Chief Justice Bauman, who wrote for the Court, had no trouble finding that Toca's offers to modify the contract were indeed offers or that Rosas accepted them.

Mutuality Without Consideration

Even if Benson were to take account of the cases that I just discussed, and even if he did concede that a relationship of bilaterality could be established through the acts of offer and acceptance alone, he would probably still not concede that a contract could be formed without consideration. Indeed, he would probably claim that the act of acceptance alone does not establish a relationship of sufficient mutuality. As is made apparent when he discusses unconscionability in *Justice in Transactions*, he argues that there must be some degree of substantive fairness—or "an exchange of equivalents"[65] that ensures "transactional integrity"[66]—if ownership is to be transferred through a contract. Benson claims that such a relationship of mutuality cannot exist, at least not prior to performance, if the consideration requirement is not met.

However, as is well demonstrated in civilian jurisdictions, a relationship of mutuality can be established through contracts that are not backed by

61. 296 F 693 (5th Cir 1924).
62. *Ibid* at 694.
63. 2018 BCCA 191 [*Rosas*].
64. *Ibid* at para 4.
65. Benson, *supra* note 8 at 180.
66. *Ibid* at 183.

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consideration.[67] My goal is not to suggest that the common law should abolish the consideration requirement merely because the civil law does not have such a requirement. Such an argument would not in and of itself be persuasive because it would only claim that the civil law gets by without the consideration requirement, not that it is better off without it. Rather, I use civilian ideas to illustrate how relationships of mutuality can be established through contracts that are not backed by consideration.

In the civil law tradition, there has never been a consideration requirement for the formation of contracts, although formalities are required to give some, but not all, donative promises legal effect.[68] For example, in Québec, gratuitous contracts of gift that transfer physical property require certain formalities,[69] but other contracts that result in a transfer of ownership in the wide sense, such as contracts of service, generally do not. Indeed, civil codes often explicitly contemplate that contracts may be gratuitous.[70] Much like in the common law tradition, consent is manifested through an offer that is unequivocally accepted by the other party,[71] meaning that each party must take an active step in order for there to be a contract,[72] although acceptance can be tacit.[73] Provided that there is consent, civilians have no trouble concluding that there was a sufficiently mutual relationship for a contract to be formed.

A common lawyer might ask how a civilian would understand a simple acceptance of an offer to do something without anything in return to be sufficient to create a relationship of mutuality. Without consideration, the relationship could be seen as too lopsided to be mutual in the eyes of a common lawyer, which is in line with Benson's argument. That said, the consideration requirement, even if fulfilled, might do little to make such a relationship less lopsided because nominal consideration, which does not often make the relationship between the parties any more balanced or reciprocal, will usually be sufficient consideration.[74] Yet, it could still be argued, perhaps unpersuasively, that even nominal consideration might ensure at least *some* mutuality in the relationship. Indeed, Benson (at least arguably) comes close to making this claim when he discusses the interplay between unconscionability and consideration, writing that "whereas consideration establishes genuinely two-sided promissory transfers that may but

67. Sage has also argued that this is the case, although his argument differs from mine. He wrote that "a gratuitous promisee may engage in active reciprocal participation. Say you loan me a large sum gratis. I might participate in this transaction by drafting a hand-written agreement, debating it with you and amending it, enthusiastically communicating my acceptance, and signing the document; I might then invest the money in my business, keep you posted on my progress and seek your advice, and so forth. Conversely, a promisee who supplies consideration may barely participate at all." Sage, *supra* note 26 at 905.

68. See e.g. art 1824 CCQ (requiring a notarial deed, or actual delivery, for gifts of property). See also *Pesant v Pesant*, [1934] SCR 249.

69. See art 1824 CCQ.

70. See e.g. art 1381 CCQ.

71. See e.g. James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford University Press, 2011) at 41 (regarding consent). See also art 1385 CCQ.

72. See e.g. arts 1385-87 CCQ.

73. See e.g. art 1394 CCQ.

74. See e.g. *Chappell & Co Ltd v Nestle Co Ltd*, [1960] AC 87, [1959] UKHL 1.

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need not involve equal value, unconscionability ensures that the contents of these transfers count substantively as genuine exchanges, gifts, or some combination thereof."[75]

Benson's assertion that "whatever a promisor's purposes or motives may be, the only thing that counts as the cause of his promise is the receipt of the other party's consideration in return"[76] does not capture everything that could constitute a relationship of mutuality in the civil law tradition. Instead of searching for consideration, civilians would look directly to the motives of the parties in order to understand how a contract might have created a relationship of mutuality.[77] Thus, civilians would have little difficulty seeing many contracts that are not backed by consideration as being mutual acts.

It is helpful to consider how a civilian might make sense of *Rosas*.[78] At first blush, it might seem that Rosas' only contribution to the modification of her contract with Toca was accepting Toca's offers to delay the payment due date. Although it is certainly possible that she got some practical benefit from the arrangement because she increased the likelihood that Toca would eventually pay her back, it is far from certain that all common law courts would recognize this as sufficient consideration.[79] Since Rosas probably got nothing, at least in the eyes of the law, that is tangible in return for her consent to those modifications, her reason for consenting to the modifications might be difficult to pinpoint if we accept, as Benson does, that mutuality requires consideration. Yet, civilians would probably have no difficulty in identifying Rosas' motive and in recognizing it as being part of a relationship of mutuality. As Robert Joseph Pothier, a classic civilian thinker, has argued, "the generosity that one of the parties wishes to exercise towards the other is sufficient"[80] to explain a party's motive for giving their consent. Rosas could be seen to have gratuitously accepted Toca's offers of modification simply because she wanted to be

75. Benson, *supra* note 8 at 183.

76. *Ibid* at 51.

77. Civilians might point to the concept of 'cause' in order to make sense of the relationship between the parties. Indeed, some have suggested that the concept of cause plays a role that is similar to that of consideration in the common law tradition, although some civilian jurisdictions, such as France, have moved away from the concept of cause. See generally Malcolm S Mason, "The Utility of Consideration—A Comparative View" (1941) 41:5 Colum L Rev 825. In many civilian jurisdictions, there is a requirement that every contract have a cause, although Gélinas and I argue that this concept is largely a didactic tool because contracts practically always have causes; that said, it is possible that they could not (see generally *6362222 Canada inc v Prelco inc*, 2021 SCC 39). See Gélinas & Goldford, *supra* note 5. See also Mason, *supra* note 77 at 826. The cause of a contract is the subjective reason for which each party entered into the contract which is often used to assess the legality or morality of the contract (see e.g. arts 1410-11 CCQ), and the cause of the obligation is what motivated one party to make a promise to the other. In a gratuitous contract, the cause of the obligation is often a sense of generosity or "intention libérale." Robert Joseph Pothier, *Traité des obligations, selon les regles tant du for de la conscience, que du for extérieur* (Chez Debure l'Aîné, 1764) at 52-53).

78. Civil codes often expressly contemplate that obligations can be modified through contracts, which as discussed do not require consideration. See e.g. art 1433 CCQ.

79. See e.g. Mark Giancaspro, "Practical Benefit: An English Anomaly or a Growing Force in Contract Law?" (2013) 30:1 J of Contract Law 12.

80. Pothier, *supra* note 77 at 53 [translated by author]. See also *Hutchison v The Royal Institution for the Advancement of Learning*, [1932] SCR 57 at 68.

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generous. While this would not mean that something moved from Toca to Rosas as would be required to satisfy the common law consideration requirement, she nevertheless experienced a benefit. Thus, the relationship between Rosas and Toca could be properly seen as one of mutuality. Not only did both parties give their consent, as manifested through offers and acceptances, but both benefited from the modifications (albeit not necessarily through something tangible) even though they were not backed by consideration.

Consideration, Bilaterality, and Mutuality

Overall, since it is possible for relationships to be bilateral and mutual even if the consideration requirement is not met, it is possible to view such relationships as resulting in a transfer of ownership in Benson's sense. This is because, like contracts backed by consideration, these contracts are formed by one party "in conjunction with the other's consent and decision," as is required for ownership to be transferred.[81] Therefore, these relationships can, even if we view contract law through Benson's lens, be properly regarded as contracts.

Of course, proponents of Benson's transfer theory might argue that even if a relationship of bilaterality and mutuality can be established without consideration, the consideration requirement makes relationships even more robustly bilateral and mutual. By this view, the consideration requirement could be justified because it ensures that relationships are more than perhaps just superficially bilateral and mutual. However, so long as the consideration requirement can be met with nominal consideration, it is hard to see how such an argument can be persuasive. If a bilateral and mutual relationship is established through the acts of offer and acceptance, and the parties adorn that relationship with nominal consideration simply to meet the consideration requirement, it could hardly be said that the relationship would be any less bilateral or mutual if nominal consideration had not been passed. Indeed, one could go so far as to argue that the consideration requirement might water down relationships of bilaterality and mutuality by overshadowing the interactive steps of offer and acceptance, which force the parties to engage with each other in order to establish a relationship of bilaterality and mutuality, with the sometimes empty formality of consideration, particularly if only nominal consideration is passed.

Benson's Transfer Theory Could Exclude Consideration

If we accept that a relationship of bilaterality and mutuality can be formed through an offer that is accepted even without consideration, it might seem that Benson's transfer theory no longer makes sense. As I noted earlier, Benson's entire transfer theory is orientated around the consideration requirement. Indeed, he began his "account of contract formation with the doctrine of consideration, taking the promise-for-consideration relation as the basic framework that

81. Benson, *supra* note 8 at 327.

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other doctrines fill in and further specify."[82] But as I have argued, even without the consideration requirement, it is possible to see contracts as transfers of ownership in Benson's sense. Thus, Benson's definition of contracts could be defended even without reference to consideration and, as I will now show, many of the arguments that he makes in developing his transfer theory could remain intact even if they were to be decoupled from the consideration requirement. Of course, his understanding of offer and acceptance would need to be revisited because, as I have already argued, these doctrines work to ensure a sufficient degree of bilaterality and mutuality between the parties even if they are not seen as intertwined with the consideration requirement. But since Benson provides a comprehensive account of virtually all contract law doctrines, this discussion barely scratches the surface of how his transfer theory might need to be revisited. While it would be beyond the scope of this article to demonstrate how this might be the case for every doctrine that Benson analyzes in *Justice in Transactions*, one example should suffice to illustrate how this could be done.

As briefly mentioned earlier, Benson's account of unconscionability is situated in relation to the consideration requirement. He argues that both doctrines work together to ensure that there is a relationship of mutuality that is sufficient to result in a transfer of ownership. Since "the adequacy of consideration" does not determine whether the consideration requirement is met, unconscionability steps in to ensure that the consideration that each party passes to the other is adequate.[83] Thus, Benson identifies "a division of labor" between consideration and unconscionability,[84] in which "the doctrines of consideration and unconscionability complement each other, ensuring, respectively, first, the possibility and, second, the actuality of a genuinely two-sided contractual promissory relation."[85] Otherwise put, consideration ensures that there are qualitatively different things that are passed from one party to the other, while unconscionability ensures that there is a sufficient level of quantitative proportionality between those things.

Yet, if we take the consideration requirement out of the picture, both of these functions could still be accomplished. Although unconscionability does not ensure that there is an exchange of qualitatively different things between the parties, most contracts that are not backed by consideration will nevertheless involve such an exchange. Parties form contracts in order to get something that they do not currently have. While it might be possible to form a contract that would require the parties to pass the exact same thing to the other at the exact same time, it is safe to assume that this is a rare occurrence. For contracts that are backed by consideration, the consideration that each party passes to the other is typically something that the other party does not have. And in contracts that are not backed by consideration, the party that did not receive anything that would count as consideration at common law might instead receive something

82. *Ibid* at 38-39.
83. *Ibid* at 175.
84. *Ibid* at 176.
85. *Ibid* at 321.

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intangible, such as a feeling of satisfaction or generosity, or even business goodwill,[86] all of which would be qualitatively different than what they have passed to the other party. Of course, if they receive nothing at all in return, the contract might be unconscionable so long as there was a relationship of inequality between the parties, which will usually be the case because, as the Supreme Court of Canada has recognized, "it is a matter of common sense that parties do not often enter a substantively improvident bargain when they have equal bargaining power."[87] Thus, consideration is not required to ensure, as Benson suggests, that qualitatively different things are passed to each party. Moreover, we can accept, as Benson does, that unconscionability ensures that there is a sufficient level of quantitative mutuality between the parties because, if the nature of the relationship between the parties is one of significant inequality and unfairness, the contract will probably be unconscionable.[88]

Benson's account of unconscionability would require some adjustments if it were to be decoupled from the consideration requirement. Of course, the link that he draws between the functions that consideration and unconscionability supposedly serve would need to be severed. But the bulk of his argument could remain intact since unconscionability serves to promote quantitative fairness (or an equality of bargaining power that assuages concerns about quantitative unfairness) while the very nature of the relationship that draws parties to form contracts ensures that there is a qualitative difference between what each party gives and receives. Moreover, it could be recognized that, by ensuring quantitative fairness, unconscionability—coupled with the fact that parties will not often form contracts to pass the exact same thing to the other—also ensures that there is something qualitatively different that each party passes to the other. But overall, since the functions that Benson identifies could be accomplished without the consideration requirement, much of his argument could remain intact without it.

Benson's Transfer Theory Should Exclude Consideration

Benson's transfer theory is best understood without the consideration requirement, even if this means that it would require some modifications, if it is to remain viable in the long run. Benson's work is an attempt to make sense of—otherwise put, to interpret[89]—the common law as it exists today. As he notes, "whether [the transfer theory] is persuasive will depend on the accuracy and soundness of my presentation and interpretations of the law."[90] Therefore,

86. Which has been held not to amount to consideration: see e.g. *Gilbert Steel Ltd v University Construction Ltd* (1976), 12 OR (2d) 19 (CA) [*Gilbert Steel*].
87. *Uber Technologies Inc v Heller*, 2020 SCC 16 at para 79.
88. Indeed, Gélinas and I develop a similar argument in order to demonstrate that the consideration requirement does not ensure that contracts are substantively fair. See Gélinas & Goldford, *supra* note 5; Gélinas & Goldford, *supra* note 6.
89. For this terminology, see Stephen A Smith, *Contract Theory* (Oxford University Press, 2004) at 4-5.
90. Benson, *supra* note 8 at 20-21.

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if the positive law is moving away from the consideration requirement, so must Benson's transfer theory if it is to stand the test of time.

As I will show, there have been shifts away from the consideration requirement, albeit in varying ways and to varying degrees, in many common law jurisdictions. My goal is not to show that the consideration requirement has been outright abolished, as that is simply untrue. Rather, I aim to show that it is arguable that the consideration requirement, at least in its traditional form, is trending towards extinction. For those that are persuaded that the consideration requirement will one day be formally retired, this suggests that Benson's theory must be understood without consideration. But even if one accepts that the consideration requirement will continue to be part of the positive law in some jurisdictions, Benson's transfer theory should still take account of the cases that have hollowed away the consideration requirement in its traditional sense.

In New Zealand, courts have trended away from the consideration requirement in the context of contract modifications which, as cases such as *Alaska Packers* and *Stilk* once authoritatively established, requires that modifications to contracts be backed by fresh consideration. In *Antons Trawling Co Ltd v Smith*,[91] the Court of Appeal of New Zealand held that, even without fresh consideration, "where the parties who have already made such intention [to be bound by an agreement to modify] clear by entering legal relations have acted upon an agreement to a variation, in the absence of policy reasons to the contrary they should be bound by their [modified] agreement."[92] Although the Court noted that this result could be achieved either by doing away with the requirement for fresh consideration for contract modifications or by adopting the expanded definition of consideration that was provided in the English case of *Williams v Roffey Bros & Nicholls (Contractors) Ltd*,[93] *Antons Trawling* is a signal that courts in New Zealand have either retreated from or whittled away the traditional rule that fresh consideration is required to modify a contract. Subsequent cases have continued to suggest that this is true. In *Teat v Willcocks*,[94] which was decided 11 years after *Antons Trawling*, the New Zealand Court of Appeal wrote that, while "the position is not yet settled" as to whether courts should follow *Williams* or do away with the requirement for fresh consideration entirely, "we are attracted to the alternative view ... that no consideration at all may be required provided the variation is agreed voluntarily and without illegitimate pressure."[95]

Some Canadian courts have gone even further by clearly rejecting the requirement that contract modifications be backed by fresh consideration, although there are still many examples of cases in which courts in some provinces have

91. [2003] 2 NZLR 23 [*Antons Trawling*].
92. *Ibid* at para 93.
93. [1991] 1 QB 1, [1990] 1 All ER 512 (CA) [*Williams*]. Courts in other jurisdictions have taken this case to mean that the future of the requirement for fresh consideration is at best unclear. See *Ma Hongjin v SCP Holdings Pte Ltd*, [2020] SGCA 106 at paras 68-69 [*Ma Hongjin*].
94. [2014] 3 NZLR 129.
95. *Ibid* at para 54.

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not adopted this approach.[96] In *NAV Canada v Greater Fredericton Airport Authority Inc*,[97] Justice Robertson of the New Brunswick Court of Appeal wrote that "a post-contractual modification, unsupported by consideration, may be enforceable so long as it is established that the variation was not procured under economic duress."[98] While this proposed "modernization of the consideration doctrine"[99] came about in *obiter* because Justice Robertson held that there was economic duress, in *Rosas*, the British Columbia Court of Appeal enforced contract modifications that were not backed by fresh consideration. It is still too early to tell how much of an impact *Rosas* will have across Canada, and even in British Columbia. Indeed, in a recent case, another judge of the British Columbia Court of Appeal wrote that "in the nuanced world of employer and employee contractual relationships," *Rosas* might not impact the requirement that modifications to employment contracts be backed by fresh consideration.[100] But this issue was not explored in detail because it "should be left to another day."[101] Overall, while there is room to speculate as to precisely how much of an impact *Rosas* (and, for that matter, *NAV Canada*) will have, it is probably safe to say that fresh consideration is no longer required to modify at least some contracts, in some provinces, in Canada.

It would be wrong to suggest that the trend that I have identified in New Zealand and Canada is advancing in a similar manner across the entire common law world. In *Ma Hongjin v SCP Holdings Pte Ltd*,[102] the Singapore Court of Appeal declined to follow the lead of courts from New Zealand and Canada, holding that fresh consideration is still required to modify a contract.[103] But the cases that I have discussed suggest that, at the very least, the existence of the consideration requirement in its traditional form is questionable in the context of contract modifications.

Although, thus far, I have only discussed examples of the hollowing away of the consideration requirement in the context of contract modifications, courts in some common law jurisdictions have, in varying ways, moved away from it more broadly. Despite the Singapore Court of Appeal's apparent retreat from this position in *Ma Hongjin,* in a previous case, *Gay Choon Ing v Loh Sze Ti Terence Peter and Another Appeal*,[104] that same court deliberated whether the consideration requirement should be abolished entirely, writing that "because the doctrine of consideration *does* contain certain basic weaknesses which have been pointed out, *in extenso*, in the relevant legal literature, it almost certainly needs to be reformed."[105]

96. See e.g. *Gilbert Steel*, *supra* note 86.
97. 2008 NBCA 28 [*NAV Canada*].
98. *Ibid* at para 31.
99. *Ibid* at para 39.
100. *Quach v Mitrux Services Ltd,* 2020 BCCA 25 at para 13.
101. *Ibid.*
102. See *Ma Hongjin*, *supra* note 93.
103. See also *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*, [2016] EWCA Civ 553.
104. [2009] SGCA 3 [*Gay Choon*].
105. *Ibid* at para 117 [emphasis in original].

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While common law judges have rarely, if ever, toyed with the idea of departing from the consideration requirement entirely as in *Gay Choon*, other jurisdictions have provided somewhat of a workaround for the consideration requirement through the doctrine of promissory estoppel. In *Waltons Stores (Interstate) Ltd v Maher*, the High Court of Australia held that promissory estoppel could apply to situations in which there is reliance on affirmative promises rather than merely waivers of existing rights.[106] Although "unconscionable conduct" or "something more" than merely a "failure to fulfil a promise"[107] would be required, *Waltons Stores* opened the door to the enforcement of a potentially wide range of agreements that are not backed by consideration. The same is true, arguably to an even greater extent, in the United States. Section 90 of the *Restatement (Second) of Contracts* provides that a promise, even if it is not backed by consideration, is binding if "the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance … if injustice can be avoided only by enforcement of the promise."[108] This widened scope of promissory estoppel does not apply in all common law jurisdictions. Indeed, following Lord Denning's retreat from *Central London Property Trust Ltd v High Trees House Ltd*[109] in *Combe v Combe*,[110] it is clear that *Waltons Stores* and §90 are not apt to describe English law, or for that matter Canadian law.[111] But the expanded scope of promissory estoppel in some common law jurisdictions is yet another way in which agreements that are not backed by consideration could be given legal effect, and this method of circumventing the consideration requirement provides yet another way for courts in other jurisdictions to, in a way, repudiate it if they chose to follow the trend seen in New Zealand, Canada, Singapore, Australia, and the United States to do so.

Of course, the continued existence of the consideration requirement in contract law is not wholly inconsistent with the existence and expansion of promissory estoppel, which is a separate doctrine that gives legal effect to promises in its own right. As Benson argues, "reliance-based liability does not challenge the integrity or the role of consideration and should not be theorized as a substitute

106. [1988] HCA 7, (1988) 164 CLR 387 [*Waltons Stores*].
107. *Ibid* at para 34.
108. *Restatement (Second) of the Law of Contracts* (American Law Institute, 1981) §90.
109. [1947] KB 130, [1956] 1 All ER 256 (HCJ).
110. [1951] 2 KB 215, [1951] 1 All ER 767 (CA) [*Combe*].
111. In Canada, there could be some room to argue that this is no longer the case. In *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada*, the Supreme Court of Canada wrote that "promissory estoppel requires that an insurer know the facts demonstrating a breach in order to be bound to any *promise to cover*." *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47 at para 24 [emphasis added]. This suggests that promissory estoppel could cover affirmative promises rather than just waivers of existing rights. However, it seems that the Court did not intend to change the law on this point since it confirmed that "promissory estoppel is an equitable *defence*." *Ibid* at para 15 [emphasis added]. In the context of an insurance company promising to cover a claim despite the client's breach, this could be framed as a waiver of the insurance company's right to deny coverage rather than an affirmative promise to cover.

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for it."[112] Benson does not view rights created through reliance, including through promissory estoppel, as resulting in transfers of ownership and, therefore, reliance does not create a contractual relationship. Instead, as previously discussed, Benson views reliance-based liability as a "a form of negligence."[113]

Nevertheless, if an expanded version of promissory estoppel is used to give legal effect to agreements that, but for the consideration requirement, would be contracts, the future of the consideration requirement can rightly be called into question. Indeed, Judge Cardozo, as he was at the time, once described promissory estoppel in the United States as "a substitute for consideration or an exception to its ordinary requirements."[114] He even went so far as to say that, in some cases, courts in New York have "adopted the doctrine of promissory estoppel as the equivalent of consideration."[115] Moreover, courts in other jurisdictions have been reluctant to take steps similar to those seen in Australia and the United States out of fear of undermining the centrality of the consideration requirement. For example, Lord Denning chose not to expand the scope of promissory estoppel in order to avoid overthrowing the consideration requirement "by a side-wind."[116]

Overall, with these developments in mind, Benson should think of ways in which his transfer theory might evolve in response to the gradual erosion of the consideration requirement if his transfer theory is not to run the risk of one day becoming nothing more than an interpretive account of the past. If he does so, Benson's transfer theory will not be destined to become outdated since, as I have demonstrated, much of his theory could be tweaked to take account of contract law without the consideration requirement.

Conclusion

Benson's transfer theory might be seen as having breathed new theoretical life into the consideration requirement by providing an account that places it at the core of what a contract inherently is rather than relegating it to the peripheries as others, including Gélinas and I, have done. But as I have demonstrated, even if we accept the bulk of Benson's transfer theory, it could, with some modifications, stand on its own two feet without the consideration requirement. Benson can and should take account of the possibility that the consideration requirement, at least in its traditional incarnation, is on the way out the door.

With this in mind, my hope is that this article will strengthen the argument that others, including but not limited to Gélinas and I, have advanced. The idea that the consideration requirement has outlived its purposes and that it often causes more harm than good is well documented.[117] Now I have demonstrated that

112. Benson, *supra* note 8 at 75.
113. *Ibid* at 73.
114. *Allegheny College v National Chautauqua County Bank*, 246 NY 369 at 373 (CA 1927).
115. *Ibid* at 374.
116. *Combe, supra* note 110 at 770. See also *Gilbert Steel*, *supra* note 86.
117. See e.g. Wessman, "Fire the Gatekeeper", *supra* note 6; Wright, *supra* note 6.

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consideration need not be deemed part of the inherent nature of a contract even if we follow what is perhaps the most recent and compelling account of contract law that is available.

Courts should, therefore, not hesitate to depart from the consideration requirement. Of course, not every case comes with facts like those seen in *Rosas* that highlight the harms that the consideration requirement can cause and its inability to do good.[118] But judges should not hesitate to follow in the footsteps of many of their predecessors from across the common law world by departing from the consideration requirement when they are faced with appropriate cases to do so. As Gélinas and I wrote, "the sky has still not fallen on civilian jurisdictions [which never had a consideration requirement] even as the world of business has become increasingly complex in recent years," "nor has the sky fallen on the countless commercial contracts governed by international instruments that do not require consideration," such as the *Convention on the International Sale of Goods*.[119] The common law of contracts will be just fine without the consideration requirement. Indeed, it might even become more simple, fair, and logical without it.

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118. See Gélinas & Goldford, *supra* note 6.
119. See Gélinas & Goldford, *supra* note 5 at 249-50.

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