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Commodified Promises and Contract Theory

Brian H. Bix*

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INTRODUCTION

In “Contract as Commodified Promise,”¹ Erik Encarnacion offers a novel perspective on contract law, one that suggests that we evaluate contractual agreements in terms of commodification. For Encarnacion, contracts involve commodified promises in the sense that, in enforceable agreements, one is literally selling a promise: the promise of some future payment, good, or service, is being exchanged for some present or future payment, good, or service.² Encarnacion puts forward this analysis as one that has elements of both an instrumental, commerce-based approach and a deontological, promissory approach.³ Encarnacion’s ultimate position appears to be, in some ways, the same as that of Nathan Oman, as elaborated in his recent book, *The Dignity of Commerce*:⁴ the primary objective and justification for contract law is the protection and promotion of commercial activity.⁵ And like Oman, Encarnacion emphasizes the benefits of commercial activity beyond

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1. Eric Encarnacion, *Contract as Commodified Promise*, 71 VAND. L. REV. 61 (2017).

2. *See id.* at 75–76.

3. *See, e.g., id.* at 117–18.

4. NATHAN B. OMAN, *THE DIGNITY OF COMMERCE* (2016).

5. *See, e.g.,* Encarnacion, *supra* note 1, at 98 (describing the author’s approach as one “according to which contract law first and foremost aims to facilitate commerce”).

wealth maximization—e.g., increased tolerance and cooperation, etc.: “*doux commerce*.”⁶

After some preliminaries, Encarnacion offers three normative principles:

- “If a promisor and promisee treat the promissory rights in question as subject to market norms (i.e., the promissory rights are commodified), then this fact counts as a strong reason *favoring* the promise’s enforceability in contract law.
- If the promisor and promisee do *not* commodify the promissory rights in question, then this fact counts as a strong reason *against* the promise’s enforceability in contract law.
- If the promisor and promisee commodify the promissory rights in question, but those rights should *not*, for intrinsic or extrinsic reasons, be commodified, then this fact counts as a strong reason *against* the promise’s enforceability in contract law.”⁷

In constructing a theory of an area of law—or evaluating someone else’s theory—it is important to determine the need for or motivation of the theory. What is being explained that was not (properly) understood before? What existing or future problem is the theory meant to address? One needs to know what the theory is trying to accomplish before one can determine the extent to which it succeeds. Encarnacion emphasizes that his is a *normative* theory of contract law.⁸ At the same time, he notes that the theory has an implicit descriptive claim: because the principles “target[] contract law and not some other institution, [the theory] *does* purport to track to some extent what contract law already recognizably accomplishes. So [the theory] should not introduce a radically different set of norms”⁹ However, as a *normative* theory, the theory need not be consistent with all current rules and practices (in fact, that might be considered a disadvantage for a normative theory, for it would leave it no “work” to do).¹⁰ For a

6. See *id.* at 66; see also OMAN, *supra* note 4, at 40–66 (discussing positive moral consequences of well-functioning markets); Nathan B. Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 IND. L.J. 693, 710–14 (2017) (summarizing the “*doux commerce*” idea).

7. Encarnacion, *supra* note 1, at 87–88 (emphasis in original).

8. See, e.g., *id.* at 88 (“the framework supplied by CCP is normative, it is not predictive or historical”).

9. *Id.*

10. Late in the article, Encarnacion adds that since “some of the view’s plausibility does depend on the justification it provides for some deeply entrenched and useful doctrines of contract law, . . . [t]he argument is thus, in part, interpretive” *Id.* at 118.

normative theory, the issue is primarily whether the objective the theory attempts to reach or accomplish is attractive, and how effective it would be in helping us to reach that objective.

It may be that for Encarnacion's approach, the more important question is related to the second inquiry: the efficacy of the theory in reaching its objective. In particular, does speaking in terms of commodification help? The article argues that the proposed analytical approach will help explain, justify, or justify reforms for, the rules regarding the intention to be legally bound, consideration, donative promises, the defense of illegality (public policy), remedies, and boilerplate provisions. Those claims are evaluated in the next section.

I. THE THEORY OF COMMODIFICATION AND ITS APPLICATION

Using commodification theory—or any other principle—to explain or reform contract law doctrine is a difficult task, as contract law rules are intended to apply across a wide range of transaction types, and it is unlikely for any theoretical principle to be persuasive in all contexts. The following discussion will inevitably focus more on the places where Encarnacion's analysis is problematic, without denying that the analysis can be helpful in other contexts.

On the intention to be legally bound, Encarnacion argues that the presence of such an intention is a reason in favor of legal enforcement, but that the law should not adopt (a strong version of) the “English rule,” under which proving an intention to be legally bound would be a requirement for enforcement.¹¹ Similarly, he argues, the doctrine of consideration should create only a *presumption* for enforcement, rather than being a requirement for enforcement.¹²

The article offers a comparably mixed verdict on donative promises. On one hand, an intention to make a promise legally binding would be a sign of commodification, and thus a reason to enforce, even for promises to make a gift. On the other hand, the article notes that enforcement might undermine the personal nature and altruism of (some) gifts, and thus might be a reason *against* enforcement.¹³ Practical considerations add some nuance to this issue about when to enforce donative promises. On one side, as Melvin Eisenberg points out,¹⁴ regarding a donative promise to be enforced in the donor's lifetime, most of us would think it would be morally wrong for the

11. *Id.* at 92–96.

12. *Id.* at 96–97.

13. *Id.* at 101–02.

14. Eisenberg's article on donative promises is quoted in Encarnacion's article, but this part of Eisenberg's analysis is not discussed. *See id.* at 100–03.

promisee to demand enforcement if, since the time the promise was made, (a) the promisor had gone from being financially comfortable to being financially distressed; or (b) the promisee had acted boorishly or violently against the promisor.¹⁵

On the other side, one might consider gift promises that are only intended to be enforced after the donor's death, or where the sole question of enforcement comes up at that point.¹⁶ Two cases commonly found in contract law casebooks are relevant: *Dougherty v. Salt*,¹⁷ (which Encarnacion cites but does not discuss at length¹⁸) and *Webb v. McGowin*¹⁹ (which is neither cited nor discussed in the article). In *Dougherty*, an aunt wanted to give her young nephew, as a gift for his good behavior, a note that would be enforceable against her estate upon her death. The promise was made using legal language declaring that the promise was given in exchange "for value received," but the estate refused to pay, and won the subsequent lawsuit because no "valuable consideration" had in fact been given in consideration for the promise.

In *Webb v. McGowin*, Joe Webb saved his boss, J. Greeley McGowin, from serious injury or death at their workplace by diverting a large falling block, but in the process suffered severe injuries himself. McGowin subsequently promised to pay Webb a certain amount every two weeks until Webb died. McGowin did so until his own death, but then McGowin's executors ceased the payments. Webb sued, and ultimately prevailed. However, the court had to use a legal fiction²⁰—that McGowin's promise created a presumption that he had asked Webb to do the heroics before or during the falling of the block—to get the court to where it wanted to go: enforcement of the promise despite the failure to meet the consideration requirement. The beneficiary of the altruistic act kept the promise throughout his lifetime; the problem came only after his death when the executor of the estate refused to continue the payments. Richard Posner wrote, regarding *Webb*:

The rescued person promised to pay his rescuer \$15 every two weeks for the rest of the rescuer's life. This was a generous gift to the extent that the promise was enforceable but a much less generous one to the extent that it was not. Had the promisor believed that

15. Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CALIF. L. REV. 821, 828–29 (1997) (discussing ingratitude and financial need as moral justifications for not keeping donative promises).

16. Parts of this analysis track a similar discussion in Brian H. Bix, *Contract Law and the Common Good*, WM. & MARY BUS. L. REV. (forthcoming 2018) (on file with author) (commenting on OMAN, *supra* note 4).

17. 125 N.E. 94 (N.Y. 1919).

18. See Encarnacion, *supra* note 1, at 100 n. 134.

19. 168 So. 196 (Ala. App. 1936).

20. See generally LON L. FULLER, LEGAL FICTIONS (1967).

such a promise was unenforceable, he might have decided instead to make a one-time transfer that might have had a much lower present value than had the annuity which he in fact promised. Both parties would have been worse off by this alternative. Hence, it is not surprising that the court held the promise to be enforceable.²¹

What is crucial for the gift to be effective, *from the donor's standpoint*, is for the donor to be able to offer enforceability. Enforceability, in these contexts, does not undermine the gift; it makes it more effective, or at least more convenient. When one focuses on the “commodification” aspect of contracting, one may miss (or at least discount) the empowerment aspect of contracting.²²

Encarnacion also argues that his principles help to justify existing illegality and “public policy” defenses to contract enforcement.²³ He notes that other considerations (e.g., rule of law concerns) support those defenses, but asserts that they are not adequate on their own to justify the (application of the) doctrines.²⁴ His principles would then be necessary (or at least adequate) to support the refusal to enforce certain kinds of agreements.²⁵

Regarding remedies, Encarnacion's view is that the choice between expectation damages and specific performance can be better understood when viewed as the balancing of three concerns: proper protection of promissory rights, fear of over-commodification, and fear of under-commodification.²⁶ That is, the concern that the property (or property-like) right in contract law is less protected than other property rights is balanced against the concern that specific performance gives contracting parties too much power over one another.²⁷

With regard to boilerplate provisions, Encarnacion argues that his approach gives support both to those who (for pro-market reasons) advocate enforcement of boilerplate provisions and to those who “raise moral concerns about boilerplate practices.”²⁸ The particular concern that the article's approach highlights is the reduction (almost to zero) of the notice consumers have of the terms to which they have purportedly bound themselves.²⁹

21. Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 419 (1977).

22. For a helpful overview of different aspects of contracting, see Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726 (2008).

23. Encarnacion, *supra* note 1, at 104–06.

24. *See id.* at 105–06.

25. *Id.* at 106.

26. *Id.* at 107–09.

27. *See id.* at 110–11.

28. *Id.* at 113, 115–17.

29. *Id.* at 116–17.

It is important to remember that Encarnacion's analysis does not purport *to resolve* these doctrinal and remedial questions,³⁰ but rather to give us the proper analytical structure in which to make decisions.³¹ As the author notes, reasonable persons can disagree—and do in fact disagree—about issues like the consistency of surrogacy agreements³² or payment for kidneys³³ with morality and public policy.

One area where the article offers commodification as an approach that might be helpful is the recent financial crisis. Encarnacion points out that aspects of that crisis might be attributed, at least indirectly, to the (over-)commodification of promises.³⁴ He notes that the selling of mortgages by local banks to other banks and investors led, on one hand, to lenders being less forgiving towards those who fell behind on payments, and, on the other hand, to borrowers feeling less of a moral obligation to repay.³⁵

The underlying point is that when parties know one another and trust one another, they are more likely to (a) want things to go well for the other party, and (b) feel a moral obligation to keep commitments to the other party.³⁶ Obviously, when a local bank sells a local owner's mortgage to a far-away bank, or slices of the mortgage to thirty-seven different far-away investors, all personal ties disappear. Contracting feels different among parties in personal or long-term relationships; that was always the point of relational contract theory.³⁷ However, it is not merely the reselling and repackaging—the further commodification—that can change the feel of contracts. Consider the party seeking a mortgage at a local branch of a multinational banking corporation, where the local bank employee setting up the mortgage does not know the party seeking it, where responsibility for the

30. See, e.g., *id.* at 103 (“CCP itself does not decide how these cases should be resolved as a matter of doctrinal design”), at 107 (“Without trying to resolve any disagreements [about contract remedies] . . .”), at 112 (“Again, it is not my present aim to settle the dispute between those who endorse a more robust enforcement regime and those who think that the current array of remedies in common law jurisdictions works just fine.”).

31. See, e.g., *id.* at 112 (“The more limited goal . . . has been to open up new argumentative avenues . . .”).

32. Compare *In re Baby M*, 537 A.2d 1227 (1988) with *Johnson v. Calvert*, 851 P.2d 776 (1993) (taking opposing views on whether surrogacy agreements are contrary to public policy).

33. See, e.g., Benjamin E. Hippen, *Organ Sales and Moral Travails: Lessons from the Living Kidney Vendor Program in Iran*, CATO INSTITUTE, Policy Analysis No. 614 (March 20, 2008), available at <https://www.cato.org/publications/policy-analysis/organ-sales-moral-travails-lessons-living-kidney-vendor-program-iran> [<https://perma.cc/78XB-RDVR>] (arguing against the conventional position that payments for kidneys is always morally wrong).

34. See Encarnacion, *supra* note 1, at 85–87.

35. See *id.*

36. See *id.*

37. See generally IAN MACNEIL, *THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL* (David Campbell, ed., 2001).

mortgage will not in any event stay with the same employee, and the local bank employee may in fact have no authority to alter the terms of the mortgage or to be understanding or “lax” regarding the enforcement of those terms. The effect is the same as the assignment of the mortgage, this time without involving any (additional) commodification.

Dealing with those one trusts is generally better, on many levels, than dealing with strangers. Partly for reasons along those lines, Anglo-American contract law for a long time discouraged the assignment of rights or the delegation of duties in connection with contract law.³⁸ For the last 200 years or so, though, the movement has been in a different direction: allowing freer assignment and delegation, a change that has significant benefits for commerce (as when small businesses can avoid cash flow problems by being able to assign accounts receivable as collateral for loans). Thus, in practice, the two main themes in Encarnacion’s work—that contract law should be about encouraging commerce and that we should focus on commodification and its occasional bad consequences—are in tension at a basic level in contract law.

II. LIMITS OF COMMODIFICATION

Finally, I want to consider an area in which I work, an area in which challenges to the enforcement of agreements based on commodification are sometimes offered: agreements in relation to family matters. In one such area already mentioned, surrogacy agreements, commodification is a prime concern, especially among those who oppose such agreements or who believe that such agreements need to be strictly regulated. However, on the whole, for the debates about which agreements within a family context should be enforced, many considerations come into play, but issues of “commodification” are usually well down the list of concerns.³⁹ For example, a couple about to marry, or already married, can, if they follow certain procedures and keep within certain substantive limits, alter the financial terms of their marriage via “premarital agreements” and “marital agreements.” In many states, an adopting couple can agree to maintain contact between

38. See generally William S. Holdsworth, *The History of the Treatment of Choses in Action by the Common Law*, 33 HARV. L. REV. 997 (1920).

39. For an overview of the legal treatment of the family agreements discussed in the following analysis, see, e.g., Brian Bix, *Domestic Agreements*, 35 HOFSTRA L. REV. 1753, 1755–61 (2007); Brian H. Bix, *Agreements in Family Law*, 4 INT’L J. JURIS. FAM. 115, 123–26 (2013); Brian H. Bix, *Private Ordering in Family Law*, in PHILOSOPHICAL FOUNDATIONS OF CHILDREN’S AND FAMILY LAW (Elizabeth Brake & Lucinda Ferguson, eds.) (forthcoming 2018).

an adopted child and the child's biological parent(s) via "open adoption" or "contact agreements." In a few states, intended parents can enter enforceable agreements for a woman to be a gestational carrier for a child that will be, at birth, the legal child of the intended parents, with no legal ties to the gestational carrier via "surrogacy agreements." Unmarried couples who wish to raise a child together sometimes enter coparenting agreements. There are also agreements about family law process: agreements to resolve issues by collaborative law processes or (secular or religious) arbitration and agreements regarding which law should apply (choice of law provisions), which court system should hear the case (choice of forum and predispute mandatory arbitration provisions), and whether the court should have jurisdiction to alter the terms (e.g., how frequently matters can be reopened).⁴⁰

At times, the contracts are regulated: for example, a large number of quite specific required terms are required in surrogacy agreements by the Illinois Gestational Surrogacy Act,⁴¹ and the Uniform Premarital and Marital Agreement Act sets general standards of procedural and substantive fairness.⁴² Sometimes, there is government approval but only a partial promise regarding enforcement, as in the states that authorize agreements for open adoption, but give the courts the power to approve, reject, or modify such agreements based on the best interests of the child.⁴³

Premarital agreements and coparenting agreements are often justified on practical grounds: that a significant number of couples will marry and agree to raise children together only if such agreements are enforceable. For example, an individual might choose not to marry if she thought that there was a chance that a family business could end up outside the family in a divorce, and someone might be willing to have a child with a partner only if the child was to be raised in a particular religion, or only if both parties' parental rights were sufficiently protected.

There are important reasons for not enforcing private agreements in domestic relationships. For example, there is a concern relating to premarital agreements that enforcement "injects the process of adversarial bargaining into intimate family relationships."⁴⁴ A more

40. See, e.g., MINN. STAT. §§ 518.18 (agreement affecting how quickly courts can revisit parenting plan), 518.552, subd. 5 (agreement to preclude or limit modification of maintenance order) (2017).

41. 750 ILL. COMP. STAT. 47 (2015).

42. 9C U.L.A. 12 (West Supp. 2015).

43. See, e.g., MINN. STAT. § 259.58 (2017).

44. See Nathan B. Oman, *Contract Law and the Liberalism of Fear*, THEORETICAL ISSUES IN LAW (forthcoming 2018) (on file with author) (manuscript at 25).

attenuated worry is that where there is too much party choice or too many pre-set alternatives, there might be a danger that, for example, the institution of marriage might lose its distinctive meaning, and the “signaling” to friends and the general public and support from them, might be undermined.⁴⁵

On the whole, as mentioned, the concern in these areas is usually *not* commodification—other than in the sense, as Encarnacion points out, that all agreements are “commodified promises,” for they are exchanges of promises for something of value.⁴⁶ Many of these agreements involve waivers of rights or the promises to protect rights (as in open adoption agreements and coparenting agreements). Even premarital and marital agreements, which, at first glance, seem to be entirely about money, do not *introduce* money into marriage and divorce. Marriage is already “commodified,” in the sense that there are state-law rules regarding property division, alimony, and child support upon divorce, and financial rights at the death of one of the spouses. Premarital and marital agreements are about *altering* those terms: modifying financial terms, not *introducing* them. On the whole, this is an area where (with some exceptions) a focus on commodification does not help us significantly in determining which agreements should be enforced and which ones should not be.

CONCLUSION

How should Encarnacion’s theory ultimately be judged? Does a commodification theory help us to resolve issues in contract law? Of course, it is probably unwise to come to any final judgments based on the first article articulating this view. This approach might well be developed further in future works. Additionally, one starts from the point that normative theories (as noted, Encarnacion describes his own theory in such terms⁴⁷) have fewer constraints than theories that purport to be descriptive, conceptual, or interpretive.⁴⁸ Still, there are criteria for the success, or at least attractiveness or usefulness, of a theory. And on such grounds there are reasons for concern about a commodification theory—concerns that, to be sure, may be fully answered by the way the theory is developed in future works. One worry

45. See Eric A. Posner, *Family Law and Social Norms*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 256, 270–71 (F. H. Buckley ed., 1999).

46. See Encarnacion, *supra* note 1, at 75–76.

47. See *supra* note 8 and accompanying text.

48. See generally Brian H. Bix, *The Promise and Problems of Universal, General Theories of Contract Law*, 30 *RATIO JURIS* 391 (2017) (discussing the different criteria of success for descriptive, conceptual, interpretive, and prescriptive theories).

is that trying to guide outcomes—or even just guide analyses—through commodification might exacerbate disagreement rather than reduce it. As Encarnacion indicates, there are significant disagreements—both among academics and among the general public—regarding what types of commodification are problematic, and when even problematic justifications might be justified by greater benefits. For example, on the latter point, even if one is uneasy about payments for kidney donations, one might accept those costs if the benefits included many patients with kidney disease living significantly longer lives (and the government saving a large portion of the current amount now spent on dialysis treatments).⁴⁹

In “Contract as Commodified Promise,” Encarnacion offers a novel and provocative approach to understanding what the justifications and limits of contract law are, and should be. Though further work may be needed, it is a worthy approach, clearly meriting our attention.

49. See Hippen, *supra* note 33 (arguing for the benefits of allowing payment for kidney donations).