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FREEDOM FROM THINGS: A DEFENSE OF THE DISJUNCTIVE OBLIGATION IN CONTRACT LAW

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Abstract
This article argues that the disjunctive obligation in contract law can be justified on moral grounds. It argues that from a perspective that regards human beings as free agents capable of choice and therefore independent of material objects, the contracting parties must be understood as agreeing to mutually guarantee one another's ownership of a certain value. This guarantee can be fulfilled either by handing over what was promised or by making up the difference between the market value and the contract value of what was promised. The plaintiff's contractual right is therefore a right that the defendant perform or pay. This makes expectation damages intelligible as a vindication of the plaintiff's contractual right. Moreover, the disjunctive obligation can be reconciled with all the doctrines that others take to be decisive arguments against it—with the doctrines of specific performance, inducing breach, impossibility, preexisting duty consideration, and nominal damages.

I. INTRODUCTION

In "The Path of the Law," Justice Holmes, seeking to wash mysticism about rights and duties in a "cynical acid," famously wrote: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else."[1] Economic theorists of contract law have embraced and extended Holmes's view. They have defended the idea that the contractual obligation is disjunctive—that it is an obligation *either* to perform *or* to pay damages.[2] However, most contract law scholars

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1. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 462 (1897).

2. Robert Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 Rutgers L. Rev. 273 (1970); David Campbell & Donald Harris, *In Defence of Breach: A Critique of Restitution*

reject the disjunctive understanding of the contractual obligation as both morally indefensible and wrong as a matter of settled doctrine.[3] They argue that the promisee has a right to performance and that this is true both normatively and descriptively. Normatively, some say that contract law enforces or at least tracks the moral obligation to keep one's promises.[4] Others say that through contract the promisee acquires a right to the promisor's deed[5] or to the thing promised.[6] Descriptively, they say that a disjunctive obligation cannot be reconciled with several settled doctrines of contract law, namely, the availability of specific performance, the tort of inducing breach of contract, the doctrine of impossibility, the rule against preexisting duty consideration, and the availability of nominal damages for breach of contract.[7]

In this essay, I argue that the common law contractual obligation is indeed disjunctive, but not for the reasons given by Holmes or by the economists who have followed in his footsteps.[8] Against its moral critics, I argue

and the Performance Interest, 22 LEGAL STUD. 208 (2002); Richard Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349 (2009); Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939 (2011).

3. W.W. Buckland, *The Nature of Contractual Obligation*, 8 CAMBRIDGE L.J. 247 (1944); Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1 (1989); Daniel Friedmann, *The Performance Interest in Contract Damages*, 111 L.Q. REV. 628 (1995); Lionel Smith, *Understanding Specific Performance*, *in* COMPARATIVE REMEDIES FOR BREACH OF CONTRACT 221 (Nili Cohen & Ewan McKendrick eds., 2005); Charlie Webb, *Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation*, 26 OXFORD J. LEGAL STUD. 41 (2006); Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007); Ralph Cunnington, *The Inadequacy of Damages as a Remedy for Breach of Contract*, *in* JUSTIFYING PRIVATE LAW REMEDIES 115, 135–136 (Charles E.F. Rickett ed., 2008); Robert Stevens, *Damages and the Right to Performance: A Golden Victory or Not?*, *in* EXPLORING CONTRACT LAW 171 (Jason W. Neyers, Richard Bronaugh & Stephen G.A. Pitel eds., 2009); Andrew Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. 1 (2009); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2d ed. 2011), at 322–325; DOUGLAS BAIRD, RECONSTRUCTING CONTRACTS (2013); JOHN GARDNER, TORTS AND OTHER WRONGS (2019), at 333–340; PETER BENSON, JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW (2019), at 241–274.

For exceptions to this dominant position, *see* ALAN BRUDNER, THE UNITY OF THE COMMON LAW (2d ed. 2013), at 191–193; Dan Priel, *Tort Law for Cynics*, 75 MOD. L. REV. 703, 719 (2014); Katy Barnett, *Great Expectations: A Dissection of Expectation Damages in Contract in Australia and England*, 33 J. CONT. L. 163 (2016); Stephen Waddams, *Breach of Contract and the Concept of Wrongdoing*, 12 SUP. CT. L. REV. 1 (2000), and STEPHEN WADDAMS, SANCTITY OF CONTRACTS IN A SECULAR AGE: EQUITY, FAIRNESS, AND ENRICHMENT (2019), at 70–91.

4. CHARLES FRIED, CONTRACT AS PROMISE (2d ed. 2015).

5. Ernest Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHICAGO-KENT L. REV. 55 (2003); ERNEST WEINRIB, THE IDEA OF PRIVATE LAW (2d ed. 2012), at 139; ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY (2009), at 69; Gold, *supra* note 3; Louis Philippe Hodgson, *Collective Action and Contract Rights*, 17 LEGAL THEORY 209 (2011).

6. Peter Benson, *Contract as a Transfer of Ownership*, 48 WM. & MARY L. REV. 1673 (2007); BENSON, *supra* note 3, at 66; Smith, *supra* note 3, at 221–233.

7. Many of these objections were first raised by Pollock and then elaborated on by others. *See* 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874–1932 (Mark De Wolfe Howe ed., 1942), at 3, 80; Buckland, *supra* note 3; Friedmann, *The Efficient Breach Fallacy*, *supra* note 3; Stevens, *supra* note 3; FINNIS, *supra* note 3, at 323–324; BAIRD, *supra* note 3.

8. In this essay I argue that the common law contractual obligation is disjunctive and I offer a justification for that position. Nothing in this essay has any implications for how we should

that the disjunctive understanding of the contractual obligation, far from being the amoral heresy it is widely believed to be, is required and morally justified by a right-based understanding of contract law. Against its doctrinal critics, I argue that the disjunctive understanding provides the most satisfactory interpretation of the contract remedy and can be reconciled with all the doctrines that others take to be decisive arguments against it.

II. WHAT DOES THE REMEDY FOR BREACH TELL US ABOUT THE CONTRACTUAL OBLIGATION?

For Holmes, the disjunctive view of the contractual obligation followed from a straightforward interpretation of the contract remedy. The ordinary remedy for breach of contract is not an order to perform but rather an award of expectation damages: "The rule of the common law is, that where a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."[9] And so Holmes, who thought law should be understood from the perspective of the bad man for whom sanctions are prices, concluded that the contractual duty is nothing more than a duty to pay damages for a failure to perform.

But we cannot, of course, reason directly from the remedy for breach of an obligation to a conception of the obligation itself.[10] It obviously does not follow from the fact that the penalty for speeding is a ticket for $100 that the driver's obligation is to "obey the speed limit or pay $100"; the driver's obligation is to obey the speed limit and the ticket is a sanction for failure to do so, not an alternate way of fulfilling the obligation. The punishment for theft is imprisonment, but the obligation is not either to refrain from taking another's property or go to jail; the obligation is to refrain from taking another's property, and jail is the punishment for, not merely the price of, breach.

Although we cannot reason directly from the remedy to the obligation, however, there are features of the contract remedy that give us reason to think that contractual obligation in particular is disjunctive—that it is an obligation to perform or pay—and that the bare failure to perform is

understand the civil law. In light of the fundamental doctrinal differences between the common law and civil law of contracts—for example, differences in relation to intention, consideration, privity, and the presumptive remedy for breach—we have good reason for thinking that the civil law rests on a different normative foundation. *See* Catherine Valcke, *Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Rhetoric*, *in* Exploring Contract Law (Jason W. Neyers, Richard Bronaugh & Stephen G.A. Pitel eds., 2009); Catherine Valcke, *On Comparing French and English Contract Law: Insights from Social Contract Theory*, 4 J. Compar. L. 69 (2009).

9. Robinson v. Harman, (1848) 1 Exch. 850, 855.

10. For arguments against this strategy, *see, e.g.*, Arthur Ripstein, Private Wrongs (2016), at 238–240; Daniel Friedmann, *Rights and Remedies*, *in* Comparative Remedies for Breach of Contract 3, 4–8 (Nili Cohen & Ewan McKendrick eds., 2005); Dori Kimel, *Remedial Rights and Substantive Rights in Contract Law*, 8 Legal Theory 313 (2002).

therefore not a wrong.[11] Put simply, we do not treat a failure to perform a contract the way we treat other acts we regard as wrongful. For example, whereas injury to body or property is a tort if committed carelessly but a crime if committed intentionally, an intentional breach of contract is not by itself a crime.[12] Furthermore, in tort law, punitive damages are permitted in addition to compensatory damages in cases where the defendant has calculated that she can profit by violating the plaintiff's right even taking into account the compensatory damages that will have to be paid for the violation;[13] in other words, in tort law, punitive damages prevent the defendant from treating compensatory damages as the price of violating the plaintiff's right. By contrast, intentional and profit-driven breaches of contract do not trigger punitive damages.[14] As a general rule, contract law draws no distinctions between intentional and unintentional breaches. And whereas the wrongful use of another's property is remedied by a disgorgement of profits, the one who breaches a contract is, in general, permitted to keep any profits or savings that result from breach.[15]

Moreover, it is a striking feature of the contract remedy that a court does not order performance even when performance is possible.[16] This clearly distinguishes the contract remedy from the tort remedy. In negligence, for example, if the plaintiff has made out her claim, it is too late for the court to order the defendant to perform her primary duty to take care not to cause harm; the causation of harm is an element of the tort and

11. Similar points are made by Allan Farnsworth in *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1145–1146 (1970) and by Stephen Smith in *Performance, Punishment, and the Nature of Contractual Obligation*, 60 MOD. L. REV. 360, 361–362 (1997).

12. STEPHEN SMITH, CONTRACT THEORY (2004), at 155; Farnsworth, *supra* note 11, at 1145. Of course, it may be a crime if the foreseeable consequence of breach is the endangerment of human life, serious bodily injury, or the destruction of property.

13. Rookes v. Barnard, [1964] AC 1129, 1227 (HL).

14. RESTATEMENT (SECOND) OF CONTRACTS §355 (1981). For the English position, *see* Addis v. Gramophone Co. Ltd., [1909] AC 488 (HL). In Whiten v. Pilot Ins., [2002] 1 S.C.R. 595 (Can.), the Supreme Court of Canada relaxed the ban on punitive damages for breaches of contract that are "high-handed, malicious, arbitrary, or highly reprehensible." But in the standard case of intentional breach of contract—breaching to pursue a more lucrative opportunity—punitive damages are unavailable in Canada.

15. For the principle that the breaching party can keep the money saved by the breach, *see* Tito v. Waddell, [1977] 3 All ER 129, 316 (CA). For the principle that disgorgement of profits is not a remedy for breach of contract, *see* Teacher v. Calder, (1899) 1 F. 39, 50 (HL); Surrey County Council v. Bredero Homes Ltd., [1993] 1 WLR 1361 (CA). However, the statement that disgorgement of profits is not a remedy for breach must now be qualified by the words "in general" because of the House of Lords' decision in Attorney-General v. Blake, [2001] 1 AC 268 (HL). Even in Blake, it was argued that a disgorgement remedy for breach of contract is appropriate only in exceptional circumstances. The exceptional character of the disgorgement remedy for breach of contract was affirmed in One Step (Support) Ltd. v. Morris-Garner, [2018] 3 All ER 659 (SC). As Markovits and Schwartz point out, in the United States, the critics of the traditional contract remedy are beginning to have an impact on the law. In a departure from the traditional position, the third Restatement of Restitution allows courts to replace the expectation remedy with a disgorgement remedy. *See* Markovits & Schwartz, *supra* note 2, at 1942, 1946.

16. SOLÈNE ROWAN, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ANALYSIS OF THE PROTECTION OF PERFORMANCE (2012), at 25.

once harm has been caused, the only thing the court can do is order compensation. In cases of breach of contract, however, performance of the contract will frequently be possible. I may agree to sell you my copy of *David Copperfield* and then change my mind. Although performance is possible, a court will order me to pay you damages—only if you can't find the book for the same price somewhere else—not hand over the book. If you take the book, this will be understood as theft, not self-help. In cases of anticipatory breach, one party declares to the other her intention to breach the contract. Performance may yet be possible; breach is merely anticipated.[17] Nevertheless, the remedy for anticipatory breach is damages, not an order to restrain breach.[18] This again contrasts with tort law, where the *quia timet* injunction allows a court to order the defendant to cease her activity if the plaintiff can show that harm to her is imminent.[19]

If the contractual obligation were an obligation to perform, we would expect that where performance is possible, the court would order it; and we would expect that where breach is anticipated, the court would restrain it. On the prevalent view of the contractual obligation (that it is an obligation to perform), courts, in treating damages as the presumptive remedy for breach, must be understood as incoherently choosing a second-best remedy when the best is available. Not only that. If it is true that the contractual obligation is to perform, a court that orders damages when performance is possible thereby authorizes a legal wrong.

We can make sense of all these features of the legal response to breach of contract, however, if the contractual obligation is disjunctive. Intentional breaches of contract are not crimes and do not warrant punitive damages because the bare failure to perform is not a wrong. The one who doesn't perform is entitled to keep the profits or savings from nonperformance and a court will not, as a general matter, order performance, restrain an anticipated breach, or regard a taking as self-help, because the plaintiff has no right to performance. The plaintiff's right is to performance *or* to

17. Hochster v. De La Tour, [1843–1860] All ER 12 (QB).

18. The fact that a court will restrain breach of a restrictive covenant does not constitute a counterexample since restrictive covenants are understood as conferring on the dominant tenement owner a property right, not merely a contractual right. *See* Tulk v. Moxhay, (1848) 41 ER 1143 (Ch.). Of course, if the contract that is repudiated is one for which specific performance is the proper remedy, then a court may restrain breach. *See* Mut. Loan Soc'y v. Stower, 15 Ala. App. 293, 73 So. 202 (1916). In Section IV.A, I offer an account of specific performance as an exception to the usual rule of contract damages.

19. A court will substitute damages for an injunction in cases of nuisance if the defendant can satisfy a stringent test. *See* Shelfer v. City of London Elec. Lighting, [1895] 1 Ch. 287. But this simply proves the rule. As we would expect with a property tort, in nuisance, the plaintiff is presumptively entitled to an injunction and the defendant bears the burden of persuading the court that damages are appropriate. In contract law, the position is reversed: the plaintiff is presumptively entitled to damages and she bears the burden of persuading the court that performance is appropriate.

the monetary sum that puts her in as good a position as she would have been in had the contract been performed.[20]

The response to these arguments from those who believe that the plaintiff has a right to performance takes three main forms. The first response argues that, notwithstanding judicial pronouncements to the contrary, an order of specific performance is an ordinary contract remedy. The second argues that damages, properly understood, vindicate the right to performance. The third argues that although the plaintiff has a right to performance, that right is overridden by other considerations that favor an award of damages. I'll consider these responses in turn, examining whether or not they constitute plausible interpretations of contract doctrine.

It is sometimes argued that although judges say that damages are the presumptive remedy in contract and that specific performance is exceptional, this is not true as a matter of practice. The most common action in contract is the action for an agreed sum—that is, for debt—and the remedy for this action is an order to pay the agreed sum.[21] The claim for payment of an agreed sum does not appear to be a claim for damages, at least as damages are usually understood, for the claim does not depend on showing loss and there is no requirement of mitigation.[22] If A and B agree that B will pay $500,000 for the construction of a house and A constructs the house but receives no payment, A is entitled to the agreed sum of $500,000, in other words, to exactly what she was promised. The contractual remedy for the failure to pay an agreed sum is thus often referred to as a performance remedy because it looks just like specific performance; it's a remedy that directs the defendant to do what she promised to do.[23] Moreover, the order to pay the agreed sum is the standard remedy for breach of a contract to pay an agreed sum, available to the plaintiff as a matter of right.[24] And since debt is the action with "the greatest practical weight in the affairs of

20. Seana Shiffrin argues that if the contractual obligation was disjunctive, an action for breach would depend on the plaintiff showing that the defendant did not offer to make things right by way of a monetary payment. *See* Seana Shiffrin, *Must I Mean What You Think I Should Have Said?*, 98 VA. L. REV. 159, 166 (2012). Pollock raised this objection as well, arguing that if the obligation is disjunctive, the plaintiff should have to plead not only the defendant's nonperformance, but also his nonpayment of damages. *See* 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874–1932 (Mark De Wolfe Howe ed., 1942), at 233. However, the plaintiff is entitled to the *court's* determination of the amount of money that will put her in the financial position she would have been in had the contract been performed. The plaintiff's cause of action is thus not barred simply because the defendant offered to pay a sum that he or she unilaterally settled on. Any prepayment by the defendant will, however, be set off against the court's damage order.

21. Stevens, *supra* note 3, at 172; Kimel, *supra* note 10, at 330.

22. JACK BEATSON, ANDREW BURROWS & JOHN CARTWRIGHT, ANSON'S LAW OF CONTRACT (31st ed. 2020), at 575.

23. Friedmann, *The Performance Interest in Contract Damages*, *supra* note 3, at 629–630; Stephen Smith, *Substitutionary Damages*, *in* JUSTIFYING PRIVATE LAW REMEDIES 93, 105 (Charles E.F. Rickett ed., 2008); Webb, *supra* note 3, at 50; Kimel, *supra* note 10, at 330.

24. Friedmann, *The Performance Interest in Contract Damages*, *supra* note 3, at 630; ROWAN, *supra* note 16, at 21.

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daily life,"[25] the order to pay the agreed sum is used to show that the common law, as a matter of practice, frequently recognizes and vindicates the plaintiff's right to contractual performance.

However, the foregoing argument rests on a confusion between the origin of the action for debt and its modern form. When a person was owed a debt, he had a remedy in law long before the law of contract was born.[26] Historically, the source of the defendant's duty to repay a debt was not found in any promise to repay. Rather, it lay in the fact that he had the plaintiff's property;[27] the creditor was treated as the owner of the money that was owed.[28] When the source of the defendant's duty to pay was proprietary rather than promissory, the remedy was proprietary as well: it was a straightforward return to the plaintiff of what was his.

The action for debt was eventually submerged in the law of contract, and the law of debt has become, as A.V. Levontin puts it, "contractualized,"[29] so that debt obligations are most often treated as arising from the promise to pay an agreed sum. Accordingly, the question for us is whether the original remedy—the order to pay the sum due—that was historically conceived as proprietary can nevertheless now be understood as an instance of contract law's normal remedy of expectation damages. I think that it can.

In the case where A builds a house for B on B's property in exchange for a promise to pay $500,000 and B doesn't pay, A need not *demonstrate* loss because the loss is necessarily equal to the agreed-to sum: A has spent time, money, and effort building a house that is in B's possession and hasn't been paid for it. A can't sell the house to someone else and the labor obviously can't be recovered, so there is no yardstick by which to measure loss beyond the contract price. Similarly, there is no requirement of mitigation, not because A has a right to B's performance, but because, once the house is built on B's property, mitigation is impossible. Again, because mitigation is impossible, the damages are measured by the sum agreed to. That is the amount needed to accomplish what the expectation remedy is supposed to accomplish: putting A in the financial position she would have been in had the contract been performed.

The foregoing analysis explains why the order to pay the sum due depends on property having passed from the seller to the buyer.[30] It is significant that if we change the facts so that A builds B a prefabricated house

25. A.V. Levontin, *Debt and Contract in the Common Law*, 1 Israel L. Rev. 60, 61 (1966).
26. *Id.* at 74.
27. As Holmes wrote, debts were not "raised by a promise," but "were a 'duty' springing from the defendant's receipt of property." Holmes, *supra* note 1, at 208; *see also* A.W. Brian Simpson, A History of the Common Law of Contract: The Rise of the Action of Assumpsit (1975), at 68–69; Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 Colum. L. Rev. 576, 586 (1969); F.B. Ames, *Parol Contracts Prior to Assumpsit*, 8 Harv. L. Rev. 252, 260–261 (1894–1895).
28. Samuel Williston, 1 The Law of Contracts §11 (1924); Levontin, *supra* note 25, at 61.
29. Levontin, *supra* note 25, at 81.
30. Elliott v. Pybus, (1834) 10 Bing. 512.

in A's factory in exchange for a promise to pay $500,000 and B refuses to take delivery and pay the money, A's remedy *will* depend on showing loss and the possibility of mitigation. That is because the house is still in A's possession and so it remains a question what she has lost by the breach. If she can resell it at the same price or higher, she hasn't lost anything and the damages she recovers will be merely nominal. The action for the agreed sum, though once conceived as a proprietary action with a proprietary remedy, is now conceived as an action in contract and its remedy is the expectation measure of damages.[31] Its availability to the plaintiff as a matter of course thus does not refute the settled principle of contract law, which is that expectation damages are the usual remedy and specific performance the exception.

Peter Benson has a different response to the argument that contract damages do not vindicate the plaintiff's right to performance. When it comes to the remedy for contract breach, Benson argues, the fundamental questions are these: "[W]hat is the promised performance and which remedy ensures that the plaintiff receives this and not something else?"[32] Sometimes, a reasonable interpretation of the contract is that the plaintiff is promised something generic. For example, suppose a salesperson at a car dealership promises a customer a brand-new 2021 Toyota Camry. A reasonable interpretation of this contract may be that it is a promise of *any* brand-new 2021 Toyota Camry. If the dealership breaches this contract, a damage award ensures that the customer receives the very thing she was promised if it represents the amount of money over the contract price that she needs to buy a brand-new 2021 Toyota Camry from any other dealership. On the other hand, sometimes a reasonable interpretation of the contract is that the plaintiff is promised something unique. Suppose A agrees to sell to B, a collector of celebrity-owned vehicles, the 2016 Porsche previously owned by Jerry Seinfeld. If A breaches this contract, only a remedy of specific performance will ensure that B receives the very thing promised. Since it is the law that the plaintiff will receive damages where the good promised is generic and specific performance where the good promised is unique, Benson concludes that both expectation damages and specific performance vindicate the plaintiff's right to receive the very thing promised.[33]

Suppose, however, that A agrees to sell to B her own gently used 2005 Toyota Camry. It is implausible to interpret this as a promise of a generic good. It's not a promise of *any* 2005 Toyota Camry; it's a promise of *this* car. But although the promised good is particularized, it's not unique; in other words, there are other cars on the market that would reasonably be viewed as substitutes. Nevertheless, if the contract remedy vindicates the

31. Treitel also notes that the action for an agreed sum is not regarded as a suit for specific performance or as an equitable remedy. *See* G.H. TREITEL, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT (1988), at 63.

32. BENSON, *supra* note 3, at 266.

33. *Id.* at 266–268.

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plaintiff's right to receive the very thing promised, we would expect this to be a case for specific performance, since damages would force the plaintiff to be satisfied with a reasonable *substitute* for what was promised. And yet, in contracts for goods that are particularized but not unique—for example, plot 105 in subdivision X or a set of chairs being sold at auction—courts will order damages for breach, not specific performance.[34] Benson does not consider this in-between category of goods that are neither unique nor generic. Yet in cases involving such goods, the damage award cannot plausibly be understood as vindicating the plaintiff's right to receive "the very thing" she was promised; on the contrary, that is precisely what the damage award appears to deny.

I turn now to the third type of response to the arguments made above, which is that although the plaintiff has a right to performance of the contract, other considerations favor an award of damages. It is, of course, often the case that after breach, performance is no longer possible, and some have suggested that this difficulty is so widespread that it explains why courts default to damage awards rather than orders to perform.[35] Others have argued that although the plaintiff is entitled to performance, the burden of court supervision explains why damages are nevertheless the normal remedy.[36] Still others argue that the plaintiff's entitlement to performance is balanced against the defendant's right to liberty, and that balance favors damages over specific performance.[37]

None of these explanations constitute plausible interpretations of the law. If the plaintiff had a right to performance that could be overridden by other considerations, we would expect that performance would be the default remedy and that damages would be awarded only upon the defendant showing that performance was not possible, or would require too much court supervision, or infringe the defendant's liberty in some

34. Section 52 of the English Sale of Goods Act gives courts discretion to award specific performance for breach of an agreement to sell goods that are "specific or ascertained." But this section has been interpreted so that it does not change the common law position; it has been taken to mean that the court may award specific performance for a good that is specific or ascertained *only* if the good is unique. *See, e.g.*, Cohen v. Roche, [1927] 1 KB 169; Joseph Chitty & H.G. Beale, Chitty on Contracts §§27-022, 27-023 (2018). For discussion, *see* Rowan, *supra* note 16, at 26; *see also* Semelhago v. Paramadevan, [1996] 2 S.C.R. 415 (Can.).

35. Smith, *supra* note 11, at 399–400; Cunnington, *supra* note 3, at 140–141.

36. Smith, *supra* note 23, at 107–109; Baird, *supra* note 3, at 55–56; Gardner, *supra* note 3, at 340.

37. James Penner, *Voluntary Obligations and the Scope of the Law of Contract*, 2 Legal Theory 325, 353 (1996). Dori Kimel argues that although specific performance ought to be the standard remedy, the harm principle suggests that if the defendant can redress the breach equally well by paying damages, the court should prefer it as the measure that is least intrusive of the defendant's liberty. *See* Kimel, *supra* note 10, at 330–332. For arguments along similar lines, *see* Benson, *supra* note 3, at 271, and Hodgson, *supra* note 5, at 224. It is not clear, however, why a court order to "hand over that painting" is more intrusive of liberty than a court order to "hand over that money," nor is it plausible to suppose that damages are the equivalent of performance even in cases where the promisee's interest is pecuniary, especially if we keep in mind the doctrine of mitigation and the rule in Hadley v. Baxendale.

significant way.[38] Yet there is no such burden on the defendant. On the contrary, the burden is on the plaintiff to show why the court should depart from the normal remedy of damages.

The only plausible interpretation of the contract remedy is that the plaintiff does not have a right to performance. Her right is *either* to performance *or* to be put in the financial position she would have been in had the contract been performed. This is not merely a prediction of what courts will do as a matter of fact. Rather, it is a statement of the contract remedy that coheres best with contract doctrine as a whole. Most importantly, the argument for the disjunctive obligation does not derive obligation from remedy in a way that would turn all legal sanctions into prices. This is the concern that animates much of the criticism of the disjunctive understanding of the contractual obligation. For example, John Finnis poses this question: If the contractual duty is a duty to perform or pay, then "what is this 'duty to pay'? Is it only a duty *either* to pay *or* to submit to the sheriff or bailiff when he comes to enforce payment by seizing one's goods? And is the 'duty to submit' only the duty to *either* submit *or* accept liability for assault and/or contempt of court?"[39]

But the disjunctive understanding of the contractual obligation need not lead us to the implausible conclusion that all legal obligations are disjunctive and that sanctions stipulate alternate ways of fulfilling our duties. As I have tried to show, the disjunctive understanding is specific to contract law. It is the only interpretation of the defendant's contractual duty that renders it correlative to the right that the contract law remedy actually vindicates.[40] This conclusion arises from features of the remedy that are unique to contract law: its general exclusion of punitive damages or gain-based measures of compensation, its indifference to the distinction between intentional and unintentional breaches (and the criminal law's not treating intentional breach as a crime), its general refusal to order performance or restrain breach even when the good is particularized and performance is possible, and its failure to treat a performance remedy as the default

38. Stephen Smith makes this point as well in *supra* note 11, at 363.

39. FINNIS, *supra* note 3, at 324; *see also* Friedmann, *The Efficient Breach Fallacy*, *supra* note 3, at 1: "Why not generalize the proposition so that every person has an 'option' to transgress another's rights and to violate the law, so long as he is willing to suffer the consequences?" Arthur Ripstein makes a similar point: "If the defendant neither performs nor pays, whatever further results would follow would have to be added as yet another disjunct: 'Perform or pay or face a contempt sanction.'" *See* RIPSTEIN, *supra* note 10, at 239. As I argue in the next paragraph, there is no reason to generalize the idea that the obligation arising from a contract is disjunctive.

40. The mismatch between the supposed right to performance and the standard remedy for breach of contract is not only a problem for theorists who believe that private law instantiates corrective justice and that remedies correct wrongs. Even if one thinks that private law remedies provide civil recourse rather than corrective justice, one should agree that the remedy must be *responsive* to the right violation. If it is not, in what sense is the remedy a form of recourse and a legitimate substitute for the individual's direct response to wrongdoing? My point is that if the plaintiff's right is to performance, the contract remedy looks unresponsive—even indifferent—to the right violation.

position. The legal remedy for nonperformance is indifferent to the plaintiff's interest in performance. This suggests that, from the perspective of contract law, nonperformance is not a legal wrong. The question now is whether this position can be normatively justified.

III. A MORAL DEFENSE OF THE DISJUNCTIVE OBLIGATION

It is generally assumed that a disjunctive understanding of the contractual obligation is morally indefensible. For many, the reason for this assumption is that contracts frequently involve promises, and it is generally thought that it is a fundamental principle of interpersonal morality that promises should be kept.[41] It is true that contracts frequently involve promises,[42] but it is not hard to show that contract law is indifferent to promissory morality. As a matter of interpersonal morality, promises are thought to be binding regardless of whether they are reciprocal; and they are frequently thought not to be binding if they are retracted, perhaps with a good reason and an apology, before the promisee relies on them. In contract law, by contrast, promises are binding only if supported by valid consideration, that is, only if they are paid for; and they are enforceable whether or not the promisee has relied on the promise to her detriment and whether or not the promisor is sincerely apologetic and has a good reason for changing her mind. So, a disjunctive contractual obligation at odds with promissory obligation would not be anomalous. It would constitute only one more instance of a divergence between promissory morality and contract law that seems to be systematic. Moreover, a divergence between contractual and promissory obligation is morally indefensible only if promissory morality is the sole morality against which contract law can be measured. Others have shown that it is not. Contract law is intelligible as a moral enterprise, but that enterprise is governed not by the morality of promise, but by the morality of right.[43] I'll argue that the morality of right requires a disjunctive contractual obligation.

On a right-based view of contract law, where there is an offer, acceptance, and consideration,[44] the promisee acquires a right and the promisor falls under a corresponding obligation.[45] The fundamental question for a right-

41. Fried, *supra* note 4; Shiffrin, *supra* note 3; Peter Linzer, *On the Amorality of Contract Remedies —Efficiency, Equity, and the Second Restatement*, 81 Colum. L. Rev. 111, 112–113 (1981).

42. But they don't always, as in the case of the often-neglected immediate exchange of material goods.

43. For different accounts of contract law in terms of the morality of right, *see, e.g.*, Brudner, *supra* note 3, at 161–236; Benson, *supra* note 3; Weinrib, *supra* note 5, at 136–140; Ripstein, *supra* note 5, at 107–144; Randy E. Barnett, *A Consent Theory of Contract*, 86 Colum. L. Rev. 269 (1986); Hodgson, *supra* note 5.

44. Intention to create legal relations is a requirement of contract formation in England and Canada, but not in the United States. *See* Restatement (Second) of Contracts §21 (1981).

45. I do not analyze the doctrines of contract formation (offer, acceptance, and consideration) since these doctrines address the question of how a contractual right can be acquired (i.e., only through a voluntary agreement in the context of a bargain), but they leave open

based understanding of contract is therefore this: What right does the promisee acquire at contract formation? The answer is not obvious. The two most systematic philosophers of private law, Kant and Hegel, disagreed about the nature of the right acquired at contract formation. Kant argued as follows.[46]

> Since it is only the causality of another's choice with respect to a performance he has promised me, what I acquire directly by a contract is not an external thing but rather his deed, by which that thing is brought under my control so that I make it mine. By contract I therefore acquire another's promise (not what is promised).[47]

According to Kant, at contract formation, the promisee acquires a right, not to a material thing, but to the promisor's "deed." The promisee thus acquires a right over a person—a right that the promisor perform what was promised. But Kant, like Hegel, offered an account of private law that is based on a fundamental distinction between persons and things and on the central idea that whereas things can be owned, persons cannot be.[48] Yet Kant's understanding of contract law allows each party to acquire control over the other's will, to acquire a right that the other act in a particular way for her benefit. It is precisely on the basis of the distinction between persons and things that Hegel denied that it is possible to acquire such a right.[49] The ownership right acquired through contract must be a right to a thing rather than a right to a person's action, Hegel argued, because only things can be owned. On this point, contract law agrees with Hegel. The personal service contract is not just presumptively but categorically incapable of specific enforcement. Once we see that the right acquired at contract formation must be a right to a thing, it is natural to think that it must be a right to the material thing bargained for—to the house, or book, or widget.[50] But Hegel thought that such a right is also inconsistent with the distinction between persons and things.

In *The Philosophy of Right*, Hegel argued that any thing, any object, is only potentially mine, not necessarily mine.[51] On Hegel's account, the

the question of whether the right acquired is a right to the promisor's deed, to the material thing, or to the material thing's exchange value. In this section, I argue that the question of whether the right acquired is to the deed, the thing, or the value is settled by a moral conception of the difference between persons and things.

46. *See also* Weinrib, *supra* note 5; RIPSTEIN, *supra* note 5, at 69; Gold, *supra* note 3; Hodgson, *supra* note 5.

47. IMMANUEL KANT, THE METAPHYSICS OF MORALS §20 (Mary Gregor trans., 1991).

48. RIPSTEIN, *supra* note 5, at 14.

49. "Objectively considered, a right arising from a contract is never a right over a person, but only a right over something external to a person or something he can alienate, always a right over a thing." G.W.F. HEGEL, THE PHILOSOPHY OF RIGHT (T.M. Knox trans., 1967), at para. 40.

50. BENSON, *supra* note 3; *see also* Smith, *supra* note 3, at 221–233.

51. "The thing that is mine is particular in content and therefore not adequate to me and so is separate from me; it is only potentially mine, while I am the potentiality of linking myself to

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connection between a human being and an object is contingent because of the free agency of human beings.[52] Free agency is the human individual's capacity for distancing itself from any particular content its will may have. It lies in the individual's capacity for distinguishing between its self and its needs, desires, and impulses, hence for detaching itself from any particular thing it might be driven by need or desire to acquire. Freedom means that there is no need or desire that I cannot in principle reject; therefore, there is no material object of desire that I cannot in principle renounce.[53] In short, freedom is (inter alia) a human possibility for independence from things.

However, Hegel argued that this possibility for the agent's independence from things is initially contradicted by the natural individual's obvious dependence on a material world for the fulfillment of its needs. It is in the act of taking control of some material object that the agent demonstrates that the object is subservient to her rather than her to it—that it is something merely available for her use according to her needs and ends.[54] But for the relation between a person and a thing to be a relation of mastery of, rather than dependence on, the thing, it must continue to reflect the detachment from things that constitutes the agent's freedom. Thus, for Hegel, the right of alienation—the right to divest oneself of property rights in a particular thing—is an essential feature of ownership. In the act of alienation, the individual shows that what she chooses in one moment she may forsake in another, and so she reveals her independence of any particular thing she might choose to acquire.

This brings us, however, to another contradiction. It now seems that freedom requires both ownership of and detachment from material things; and whereas ownership requires taking control, detachment requires letting go. For Hegel, the solution to this problem is contract. In the immediate exchange of, for example, this loaf of bread for that bottle of wine, I simultaneously acquire and alienate property; as Hegel wrote, in contract, each "ceases to be an owner and yet is and remains one."[55] Yet, as an immediate exchange of material things, contract is only a partial solution to the problem. Although I demonstrate my independence of *this particular* material

it." HEGEL, *supra* note 49, addition to para. 15. Similarly, Kant describes objects of choice as those which "could objectively be mine or yours" in *supra* note 47, at §6.

52. The following account of Hegel's understanding of the relationship between persons, property, and contract relies on Alan Brudner's interpretation and elaboration of Hegel's philosophy of private law in THE UNITY OF THE COMMON LAW, *supra* note 3, at 186–193. It will be clear that this interpretation makes the connection between persons and property very different from the connection argued for by Margaret Radin in *Property and Personhood*, 34 STAN. L. REV. 957 (1982). Although Radin takes Hegel's philosophy as her starting point, she reinterprets his account of the conceptual connection between personhood and property as a psychological connection.

53. "What the will has decided to choose it can equally easily renounce." HEGEL, *supra* note 49, at para. 16.

54. *Id.* at paras. 41, 42, 44, 45.

55. *Id.* at para. 74.

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thing in the exchange, I have not demonstrated my independence of material things *as such*, since all I have done is exchange one material thing for another.

We can resolve this problem, however, if we understand contract, not merely as an exchange of material things, but as an agreement as to the material things' exchange value. The exchange of bread for wine is an agreement that, as between the parties to the contract, the value of the bread is equal to the value of the wine. In the exchange, the owner of the loaf of bread is recognized as the owner of its value (the bottle of wine) and the owner of the bottle of wine is recognized as the owner of its value (the loaf of bread). Through contract, therefore, the parties become, not merely owners of yet another material thing, but owners of their property's exchange value.[56] Exchange value is a measure of worth that abstracts from the particular qualities of various material objects and allows for their comparison; the abstraction from material thing to its exchange value provides a perspective from which all objects may be viewed as fungible all-purpose means. Value is thus what a free agent detached from the objects of choice can own.[57]

The abstraction from the material thing to its value that is implicit in the immediate exchange of things is explicit in the executory contract. Here, the parties exchange not material things in the present, but promises to do things in the future: A promises B that in three months' time, she will pay B $100,000 for possession of B's cottage. What B acquires in the present is not a material thing, but a guarantee of her property's value ($100,000); and what A acquires in the present is not a material thing but a guarantee of what her $100,000 can buy (a cottage).[58] The executory contract thus confers an ownership right to the agreed-upon exchange value of one's property against the one who promised to guarantee it. Before the executory

56. "Since in real contract each party retains the same property with which he enters the contract and which at the same time he surrenders, what remains identical throughout as the intrinsic property in the contract is distinct from the external things whose owners change when the exchange is made. What remains identical is the value, in respect of which the objects of the contract are equal to one another whatever the qualitative external differences of the things exchanged." *Id.* at para. 77.

57. Sometimes Hegel speaks of contract as an exchange of external things (*see* HEGEL, *supra* note 49, at paras. 75, 76, 80); but as Hegel explains, there is a nonmaterial side to contract, and that side is value, which is what is finally owned. In contract, Hegel writes, "I cease to be an owner and yet remain one, and by virtue of that become one. The latter is the rational side of contract, the universal and enduring [element]. This universal and enduring [element] is value. This value remains with me, only the quality, the character of the possession, changes hands. That I remain an owner of value is the real point of contract." G.W.F. HEGEL, LECTURES ON THE PHILOSOPHY OF RIGHT, 1819/20, (Alan Brudner trans., University of Toronto Press forthcoming); *see also* HEGEL, *supra* note 49, at para. 63.

58. It might be objected that the contractual agreement cannot be an agreement about exchange value because the values exchanged may be radically unequal (for example, a peppercorn may be valid consideration for a house). But in contract, the parties agree on the exchange value of their property, but the only judges of the adequacy of the exchange are the parties themselves. Although the market may say otherwise, there is nothing to prevent them from agreeing that, as between themselves, this house has the value of that peppercorn.

contract, the parties are owners of material objects; at the moment of contract formation, they are the owners of their property's abstract exchange value. Thus, the parties to an executory contract are owners completely detached from the material things they own.

I have argued that when seen from the perspective of the free agent detached from material objects, contract is the parties' mutual guarantee of their property's exchange value. It is a mutual guarantee that "the value of this equals the value of that." But the guarantee that "the value of this equals the value of that" can be fulfilled in one of two ways: either by handing over "this" or by handing over "the value of this," in other words, its monetary equivalent.[59] If what the parties acquire at contract is the guarantee of their ownership of an agreed-upon value, the payment of value respects ownership no less than performance. The contractual obligation is thus disjunctive. "Breach" means a factual (not legally wrongful) failure to hand over "this," making the breaching party liable to give the plaintiff the agreed-upon value of what was promised.[60] So, for example, if A promises to deliver a dining room set and B promises to pay $5,000, the agreement means that A owns $5,000 and B owns $5,000 worth of dining furniture. If A fails to deliver the material goods, the agreement that B owns $5,000 worth of material goods is equally fulfilled if A pays to B the difference between the contract price of the material goods and the amount it will cost B to buy those material goods in the market. In either case, A will have fulfilled her guarantee of what B's money can buy. This is precisely what the expectation measure of damages requires, and it is importantly indifferent as to whether or not B actually goes out into the market to buy a substitute for the goods that were promised. That is because the expectation remedy abstracts from the relationship between the person and the material thing and vindicates the plaintiff's ownership of the agreed-upon exchange value of her property. It is the remedy for breach

59. Above I set out Hegel's view that the right one acquires through contract is a right to exchange value. I argue that the logical consequence of that view is that the contractual obligation is disjunctive. I do not claim, however, that Hegel himself drew that conclusion from his theory of the contractual right. Hegel is ambiguous on this point. Compare, for example, HEGEL, supra note 49, para. 77, where Hegel says that the property acquired through contract is distinct from the external things to be exchanged, with paras. 79 and 93, where he says that the contractual duty is to carry out the stipulated terms. Interestingly, though, he sees in para. 93 that the consequence of a duty to carry out stipulated terms is that an intentional failure to do so is a criminal deprivation of property deserving punishment. Yet the common law did not treat it so.

60. Charlie Webb argues that the clearest evidence of the plaintiff's right to performance is the concept of breach: "A breach of contract is the breach of the duty to provide a contracted for performance. It is accordingly premised on there being a duty on the defendant to perform. If there was no such duty there could be no such thing as a breach of contract." But this assumes what needs to be established. There is nothing in the word "breach" that necessitates a right of performance. "Breach," in the context of contract law, may mean a factual failure to perform without any necessary implication that this constitutes a legal wrong. *See* Webb, *supra* note 3, at 46.

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that treats the plaintiff as a free agent—owner of, and yet detached from, the material thing that is owned.[61]

Many have argued that parties typically enter contracts in order to secure performance and that it is implausible to interpret them as bargaining for a disjunctive obligation.[62] If true, this observation would be a powerful argument against a justification for the disjunctive obligation resting on the empirical claim that parties are either indifferent between performance and payment or that they implicitly agree to a "perform or pay" term. But it is no argument against the moral justification for the disjunctive obligation I have offered. That justification speaks about the view the *law* must take of human beings and their contractual agreements if it is to respect them as free agents independent of the material things they own; and since the remedy for breach comes from the law, that remedy must be appropriate to individuals conceived in this way. My thesis is not an empirical claim about, and so cannot be rebutted by empirical evidence of, what human beings typically want when they contract; for when it comes to remedies, what they want is beside the point. Thus, a court will order a remedy of damages even if a contract explicitly stipulates that the remedy for breach is performance.[63]

It might be said that the disjunctive conception of the contractual obligation strips contract law of its normativity since it seems to suggest that the promisee lacks the right to demand that the contract be kept and that the promisor remains at liberty to choose whether or not to abide by the contract. And if the disjunctive conception of the obligation denies that contracts must be kept, then it cannot be a theory of contractual

61. It might be wondered whether this account of the right acquired at contract formation can be squared with the availability of damages for loss suffered as a consequence of not being able to put the thing promised to its intended use. Recent accounts of consequential loss have emphasized that consequential loss is recoverable only when the contract is reasonably interpreted to include an implicit assumption of responsibility for such losses. *See, e.g.*, BENSON, *supra* note 3, at 278–279; Adam Kramer, *An Agreement-Centered Approach to Remoteness and Contract Damages*, *in* COMPARATIVE REMEDIES FOR BREACH OF CONTRACT 249 (Nili Cohen & Ewan McKendrick eds., 2005); Transfield Shipping Inc. v. Mercator Shipping Inc., [2009] 1 AC 61, 69 (HL). So the contract is to be interpreted, not as an exchange of $100 for X but rather $100 for X plus an assumption of responsibility for consequential losses. On the account I have offered, breach requires a payment of the promised exchange value, which in this case is the value of both X and the uses to which it was reasonably to be put.

62. Smith, *supra* note 11, at 369; Gold, *supra* note 3, at 54; Buckland, *supra* note 3; Friedmann, *The Performance Interest in Contract Damages*, *supra* note 3, at 629; Seana Shiffrin, *Could Breach of Contract Be Immoral?*, 107 MICH. L. REV. 1551, 1565 (2009).

63. *See* RESTATEMENT (SECOND) OF CONTRACTS §359 cmt. a (1981). And *see, e.g.*, Snell v. Mitchell, 65 Me. 48, 50 (1876) ("Neither party to a contract can insist, as a matter of right, upon a decree for its specific performance."); Stokes v. Moore, 262 Ala. 59, 64 (1955) ("such an agreement [stipulating that breach would give rise to an injunction] would serve to oust the inherent jurisdiction of the court to determine whether an injunction is appropriate"); Fazzio v. Mason, 249 P.3d 390, 397 (Idaho 2011). In England, *see, e.g.*, Quadrant Visual Commc'ns v. Hutchison Tel. (UK) Ltd [1993] BCLC 442, 451, where Stocker LJ said: "Once the court is asked for the equitable remedy of specific performance, its discretion cannot be fettered."

obligation.[64] But the account I have elaborated above does not deny that contracts must be kept. That account shows how contractual obligation must be understood if it is to be consistent with treating human beings as free agents distinguished from, and independent of, the objects of their choice. It says that law must understand contracts as the parties' mutual guarantee of one another's ownership of their properties' exchange value. On that understanding of what a contract is, contracts must be kept. The mutual guarantees of value must be fulfilled, but they can always be fulfilled in one of two ways: either by handing over the material thing or by paying its value.

IV. DOCTRINAL OBJECTIONS

A. Specific Performance

The most obvious objection to what I have said thus far is that it cannot account for the fact that courts sometimes respond to a breach of contract with an award of specific performance, an equitable remedy that requires the defendant to hand over the very thing promised.[65] In response to this objection, Holmes said simply: "I hardly think it advisable to shape general theory from the exception."[66] That's true, of course, but the exception must nevertheless be explained and explained in a way that reconciles the exception with the rule. In what follows, I offer a theory of specific performance as an exceptional supplement to the common law rule that the remedy for breach is damages.

The common law's view of the contingent relationship between persons and things is true in the sense that there is no object of choice that a free agent could not in principle renounce. But although there is no particular thing that is "necessarily mine," it is nevertheless possible for a human agent to form deliberative and autonomous attachments to things—a home, a collection, a career, for example—that fit into an overall life plan. Whereas the common law conceives freedom negatively as a freedom from all attachments, equity conceives freedom as positive—as the capacity to form and live according to self-authored plans. While the common law presumes that all attachments are renounceable, equity recognizes that although any material object *could* be renounced, material objects may nevertheless become bound up with projects and plans in ways that make otherwise

64. In his critique of Holmes's theory of the disjunctive obligation, Arthur Ripstein writes that "any account of duty on which it turns out that there are no duties must have set up the problem in the wrong way." *Supra* note 10, at 238.

65. This objection was raised by Pollock and has been echoed by many others. *See* HOLMES-POLLOCK LETTERS, *supra* note 7, at 3; Friedmann, *The Efficient Breach Fallacy*, *supra* note 3, at 18; Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 FORDHAM L. REV. 1085 (2000); Stevens, *supra* note 3; Nicholas McBride, *A Case for Awarding Punitive Damages in Response to Deliberate Breaches of Contract*, 24 ANGLO-AM. L. REV. 369, 390 (1995).

66. Holmes, *supra* note 1, at 462–463.

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ordinary things unique for the individual, hence unamenable to substitution; and projects and plans are the way freedom is realized in a concrete life. In its remedy of specific performance, equity thus recognizes that the loss of a deliberative attachment—of a material object that has become unique because bound up with a free agent's thought-out projects and plans—is a setback to the free agent's positive freedom.[67]

So understood, the equitable remedy of specific performance does not disturb the central claim of this paper, which is that, as a rule, the contractual obligation is to perform or pay. Specific performance, on this account, is not owed until a court determines that the relationship between the plaintiff and the object of the contract is not the relationship of indifference assumed by the common law of contracts. The defendant's obligation to specifically perform follows from the court's determination that in the particular case, the plaintiff's attachment to the thing bargained for has the normative significance that equity recognizes—that it is a deliberative attachment and part of a life plan—and is therefore an attachment a court can recognize consistently with respect for the agent's freedom.

Two features of the specific performance remedy support this account of its normative significance. The first is the fact that specific performance is a discretionary remedy, a remedy the plaintiff is not entitled to as of right.[68] This does not mean that the court's decision is not governed by precedent or principles.[69] When we say that equitable remedies are discretionary, we mean that courts, in deciding whether or not to award them, may attend to considerations beyond the immediate interaction between plaintiff and defendant; these considerations do not definitively settle the matter one way or the other, but provide a reason for a particular outcome that must be weighed against other reasons.[70] I have suggested, for example, that the court must attend to whether the object of the contract is, for the plaintiff, a deliberative attachment. But out of equal concern for the realized freedom of both contracting parties, the court must also ask whether or not an order of specific performance would cause hardship to the

67. The foregoing account of specific performance assumes that the difference between the common law and equity is normative and not merely historical or jurisdictional. For an elaboration of this understanding of the difference between law and equity, its connection to Hegel's philosophy of private law, and its implications for the various branches of private law, *see* BRUDNER, *supra* note 3; *see also* Jennifer Nadler, *What Is Distinctive About the Law of Equity?*, OXFORD J. LEGAL STUD. gqaa065 (2021), https://doi.org/10.1093/ojls/gqaa065.

For a similar account of specific performance, *see* Hanoch Dagan & Michael Heller, *Specific Performance* (Columbia Law & Economics Working Paper No. 631; Columbia Public Law Research Paper No. 14-674, 2020). Although I agree with Dagan and Heller that specific performance is geared to concern for life plans, as is clear from the previous section, I disagree that the common law remedy for breach can be understood in these terms.

68. TREITEL, *supra* note 31, at 63.

69. WADDAMS, *supra* note 3, at 182.

70. Stephen Smith takes a similar view of the discretionary nature of specific performance. *See* Stephen Smith, *Form and Substance in Equitable Remedies*, *in* DIVERGENCES IN PRIVATE LAW 321, 340 (Andrew Robertson & Michael Tilbury eds., 2016).

defendant.[71] The fact that the court may attend to considerations that lie beyond the parties' contractual agreement suggests that, in awarding specific performance, the court is doing something more than giving effect to the plaintiff's rights vis-à-vis the defendant. It is giving effect to what is required of it—the court—as a public institution whose authority depends on its equal concern for the realized freedom of both parties.[72]

A second feature of the remedy of specific performance suggests that the defendant's duty to perform derives from her duty to obey the court rather than from the plaintiff's rights under the contract. Whereas rulings at common law historically took the form of impersonal declarations of the plaintiff's rights against the defendant—"it is this day adjudged that the plaintiff shall recover $100 from the defendant"—the equitable remedy of specific performance historically took the form of a court order directed personally at the defendant—"the defendant is ordered to give the cow Daisy to the plaintiff."[73] As Spry has argued, this difference is not merely linguistic but normative; it reflects the difference between a judgment that is declaratory of the parties' legal rights vis-à-vis one another and an order that is expressive of what justice requires of the court in the particular case.[74] Relatedly, the defendant's failure to obey an order of specific performance is, as Stephen Smith says, understood as an affront to the court's authority and is thus contempt of court punishable by imprisonment.[75] As the discretionary and personal nature of the order suggests, specific performance reflects the court's determination of what its *own* concern for the plaintiff's and defendant's autonomy requires in the particular case. Its exceptional availability is therefore no counterargument to the claim that the *contractual* obligation, the obligation generated by the parties' agreement, is an obligation either to perform or pay.

One further point may be made here. Stephen Smith has suggested that specific performance is an anomalous equitable doctrine in the following sense. As a general rule, equitable doctrines prevent the defendant from doing what she, as a matter of common law, is entitled to do. As Joseph

71. Patel v. Ali, [1984] 1 All ER 978, 982 (HC) makes clear that the discretion to consider the hardship to the defendant of an order of specific performance allows the court to attend to considerations that are beyond the scope of the contracting parties' relationship: "I am satisfied that the court's discretion is wide enough, in an otherwise proper case, to refuse specific performance on the ground of hardship subsequent to the contract and not caused by the plaintiff."

72. Stephen Smith similarly argues that "[t]he rules governing specific relief are not rules about how citizens should treat one another; they are rules about how judges should respond to citizens' requests for assistance." *Supra* note 70, at 341.

73. *Id.* at 322–323; *see also* I.C.F. Spry, The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages (2014), at 30–32. As Smith points out in *Form and Substance in Equitable Remedies*, *supra* note 70, at 324, this distinction has been abolished in England. What I offer here is a justification for that historical distinction, which, as Smith argues, was abolished because it was thought to be a matter of archaic language having no normative significance.

74. Spry, *supra* note 73.

75. Smith, *supra* note 70, at 323.

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Story wrote: "The whole system of Equity Jurisprudence proceeds upon the ground that a party, having a legal right, shall not be permitted to avail himself of it for the purposes of injustice, or fraud, or oppression."[76] For example, unconscionability prevents the plaintiff from insisting on a contract that the common law regards as valid and enforceable; proprietary estoppel prevents the defendant from evicting the plaintiff from her property in circumstances where the common law says that eviction is a lawful exercise of her property rights; the trust, by recognizing a beneficial interest in the cestui que trust, prevents the common law titleholder from exercising the full ownership rights that the common law says she has. But, says Smith, specific performance doesn't follow this pattern, because it vindicates the plaintiff's right to performance and that is a right that the common law recognizes as well.[77]

But of course, specific performance looks anomalous only from the perspective of one who assumes that the plaintiff has a common law right to performance; from that perspective, equity and the common law appear, anomalously, to view the contractual entitlements and obligations in the same way. But if, as I have argued, the defendant is, at common law, obligated only to either perform or pay, then specific performance fits the equitable pattern: it restrains the exercise of a legal right. Whereas the common law says that the defendant is entitled to choose payment over performance, equity will, under certain circumstances, prevent the defendant from exercising this option and require performance. The exceptional availability of an *equitable* remedy of specific performance for breach of contract is therefore not only not a counterargument to the disjunctive character of the common law contractual obligation; it is an argument in its favor.

B. The Tort of Inducing Breach of Contract

In his correspondence with Holmes, Pollock wrote: "if the obligation is, as you maintain, only alternative, how can it be wrong to procure a man to break his contract, which would then be only procuring him to fix his lawful election in one way rather than another?"[78] Pollock's argument has been repeated by many and the existence of the tort of inducing breach of contract is now taken to be a decisive argument against the disjunctive understanding of the contractual obligation.[79] I will argue that it is not.

The tort of inducing breach applies to circumstances that have the following structure. B and C have a contractual agreement. A persuades B to breach that agreement, thereby causing economic harm to C. The tort of inducing breach allows C to sue A for damages. It cannot be denied that

76. JOSEPH STORY, 2 COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA §1316 (1836).

77. Smith, *supra* note 70, at 330.

78. HOLMES-POLLOCK LETTERS, *supra* note 7, at 80.

79. Perillo, *supra* note 65; Friedmann, *The Performance Interest in Contract Damages*, *supra* note 3, at 632; McBride, *supra* note 65, at 389; BAIRD, *supra* note 3, at 54–55.

the existence of this tort appears to pose a serious problem for a disjunctive view of the contractual obligation. It is natural to think that because the law says it is wrong for A to induce B to do X, it is therefore also an independent wrong for B to do X. One of the reasons this inference appears intuitively correct is that it seems to mirror the structure of accessory liability: because it is wrong for B to do X, it is wrong for A to be an accessory with B in doing X. It could not be wrong for A to be an accessory in doing X if it was not independently wrong to do X. But although the tort of inducing breach of contract may, at first blush, look like a case of accessory liability, it isn't.[80]

As others have pointed out, if A induces B to trespass on C's land, accessory liability works by attributing the wrongful act to both parties—to the one who induced the act and the one who committed it. Once the wrongful act is attributed to both parties, they are jointly liable for it.[81] But the reason A and B can be held jointly liable for the trespass is that property rights are in rem: A and B both owe a duty to C to keep off her land. On the other hand, when A induces B to breach her contract with C, only B owes a contractual duty to C. For example, in Lumley v. Gye,[82] in which Gye induced Joanna Wagner to breach her contract with Lumley and sing at his opera house instead, only Wagner owed Lumley a contractual duty to sing. How could Gye be jointly liable for breach of an obligation he did not have?[83] Whatever obligation Gye had, it was not the same as Wagner's, and so the tort of inducing breach cannot be a case of accessory liability.

For the mere *existence* of the tort of inducing breach to be a counterargument to the disjunctive obligation thesis, it must be true that, as a matter of logic, if it is wrong to induce an act then the act must be independently wrongful. But is that true? The tort of intimidation suggests that it is not. The tort of intimidation makes it a wrong against C for A to threaten B with harm unless B withdraws his custom from C's business.[84] But it is, of course, not independently wrong for B to withdraw his custom from C's business. The tort of conspiracy is another example. Quinn v. Leathem[85] involved a dispute between the defendants, who were trade union officials, and the plaintiff, who was a butcher, about the plaintiff's employment of workers who refused to join the union. The defendants approached the plaintiff's main customer and told him that unless he stopped purchasing meat from the plaintiff, his employees would leave his employment. The customer did stop purchasing from the plaintiff and the plaintiff

80. In OBG v. Allan, [2008] 1 AC 1 (HL), Lord Hoffmann argued that the tort of inducing breach of contract is based on "the general principle that a person who procures another to commit a wrong incurs liability as an accessory" (para. 3). Others have endorsed this view. *See, e.g.*, Hazel Carty, An Analysis of the Economic Torts (2010), at 61.

81. Robert Stevens, Torts and Rights (2007), at 275–276; Pey-Woan Lee, *Inducing Breach of Contract, Conversion and Contract as Property*, 29 Oxford J. Legal Stud. 511, 521 (2009).

82. 118 ER 749 (KB 1853).

83. Stevens, *supra* note 81, at 275–276; Lee, *supra* note 81, at 521–522.

84. Rookes v. Barnard, [1964] AC 1129 (HL).

85. [1901] AC 495 (HL).

successfully sued the defendants for the economic loss that resulted. Although it was plainly not unlawful for the customer to choose to purchase his meat elsewhere, the House of Lords found that it is legally wrong to combine merely for the purpose of injuring another. So, it was wrong for the defendants to combine to induce the customer to withdraw his custom even though the withdrawal was not an independent wrong.

In the cases of intimidation and conspiracy, the reason that makes inducing the act wrong does not make the act independently wrongful.[86] I do not think it is a coincidence that the tort of inducing breach of contract is part of a family of torts—the economic torts—that includes intimidation and conspiracy. The fact that these torts make it wrong to induce an act that is not independently wrong is unusual. It raises a puzzling and controversial question about what makes the inducement wrongful, a question that is beyond the scope of this essay. For the purposes of this essay, the central point is the following one: the fact that the law makes it wrong for A to induce B to breach her contract with C tells us nothing about whether it is independently wrongful for B to breach her contract with C—just as the fact that the law makes it wrong for A to conspire with another to induce B to withdraw her custom from C tells us nothing about whether it is independently wrongful for B to withdraw her custom. The mere *existence* of the tort of inducing breach of contract is thus no argument against the disjunctive conception of contractual obligation. Everything turns on the question of *why* inducing breach of contract is wrong, and the claim that inducing breach is wrong because the plaintiff has a right to performance simply assumes what needs to be established.

Although the mere existence of the tort of inducing breach does not undermine the disjunctive conception of the contractual obligation, there is a popular account of the tort that does—if it is true. This account says that the tort of inducing breach, like, for example, the tort of conversion, protects a proprietary right and the proprietary right it protects is the plaintiff's right to contractual performance. On this view, the tort of inducing breach of contract allows the plaintiff to sue the defendant for usurping the performance to which she alone is entitled.[87] This account coheres with the view that the plaintiff is entitled to performance, but it cannot be the true account of the tort for at least two reasons.

86. There are many other examples in the American jurisprudence on the tort of interference with business relations. For example, in Walker v. Cronin, 107 Mass. 555 (1871), the defendants were found liable for enticing the plaintiff's prospective and at-will employees; so it was wrong for the defendants to induce the employees to refuse to work for the plaintiff —but since the employees were not contractually bound to the plaintiff, their refusal was not independently wrong. *See also* Azar v. Lehigh Corp., 364 So. 2d 861 (Fla. Dist. Ct. App. 1978); Daugherty v. Kessler, 286 A.2d 95 (Md. 1972).

87. *See, e.g.*, Francis Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 679 (1923); Richard Epstein, *Inducement of Breach of Contract as a Problem of Ostensible Ownership*, 16 J. LEGAL STUD. 1 (1987); BENSON, *supra* note 3, at 91–94.

First, the defendant may be liable for inducing breach without acquiring the promised performance. For example, a union official seeking to punish a supplier who employs nonunion workers may persuade manufacturers to breach their supply contracts with that supplier. Although this satisfies the requirements of the tort,[88] we could not plausibly describe the union official as taking for himself something that properly belongs to the supplier (the union official does not fulfill the manufacturers' supply requirements).[89] Second, the proprietary explanation of the tort of inducing breach cannot account for the fact that the tort requires the plaintiff to show that she has suffered harm. Trespass and conversion are proprietary torts; the gist of these torts is that the defendant has usurped the plaintiff's right of exclusive control over her property. Because the usurpation of another's right of exclusive control is wrong regardless of whether it causes material harm,[90] these torts are actionable per se. If the wrong at issue in the tort of inducing breach is the usurpation of the plaintiff's right of exclusive control over the contractual performance, then it too should be actionable regardless of harm. But it is not. Liability requires inducing a breach that causes economic harm to the plaintiff.[91] In short, usurpation of the contractual performance is neither necessary nor sufficient for liability in tort. The wrong of inducing breach is therefore not the wrong of usurping the plaintiff's property right in the contractual performance.[92] That conclusion should not be surprising because, as I have argued, the plaintiff has no such right.

C. Impossibility

It is sometimes said that when events occurring after contract formation make performance impossible, impossibility of performance is a valid defense to a claim of breach of contract. Robert Stevens says that this doctrine demonstrates the existence of a contractual right to performance because "it is never, or almost never, impossible to pay a sum of money by way of damages."[93] As Stevens suggests, a doctrine that discharges the contractual obligation when performance is impossible may seem inexplicable if the obligation is disjunctive, because, for example, the destruction of

88. Temperton v. Russell, [1893] 1 QB 715.

89. For a similar point, *see* Perillo, *supra* note 65, at 1100.

90. *See, e.g.*, Arthur Ripstein's discussion of the trespasser who carefully and harmlessly enters your home and naps in your bed. Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFFS. 215, 218 (2006).

91. CARTY, *supra* note 80, at 44; Rookes v. Barnard, [1964] AC 1129 (HL); Greig v. Insole, [1978] 3 All ER 449, 485 (Ch.).

92. As Nicolas Cornell shows, this is even more obviously the case in the American version of the tort, which allows for tortious liability even in cases where the defendant interferes with a contractual agreement that is unenforceable, terminable at will, or even merely prospective and that therefore clearly could not be the subject of a property right in the plaintiff. See Nicolas Cornell, *Competition Wrongs*, 129 YALE L.J. 2032 (2020).

93. Stevens, *supra* note 3, at 172; *see also* Buckland, *supra* note 3, at 248; BENSON, *supra* note 3, at 511.

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the promised music hall by fire or the sinking of the promised ship at sea doesn't make it impossible for the promisor to perform the alternate obligation, which is to pay. So, the argument goes, discharge for impossibility shows that the contractual obligation cannot be disjunctive. However, the doctrine of impossibility, properly understood, presents no challenge to the disjunctive obligation.

In Taylor v. Caldwell,[94] the leading case on the effect of impossibility on contract, Caldwell, the owner of Surrey Gardens and Music Hall, entered a contract with Taylor for the use of the hall for music concerts. After the agreement was concluded but before the date of the first concert, the hall burned down. Taylor brought an action for breach of contract against Caldwell. Lord Blackburn held that Caldwell was discharged from his contractual obligation to provide the hall because the "specified thing" contracted for had perished and framed his judgment in terms of an implied condition:

> [W]here, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.[95]

There are two important observations to make about Lord Blackburn's judgment. The first is that the reason for the discharge of the obligation in *Taylor* is not that performance became impossible. As one would expect if the contractual obligation is disjunctive, Lord Blackburn was clear that impossibility of performance is not by itself a reason for discharge: "There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible."[96]

The second observation is that the reason for the discharge of the obligation is that, as a matter of contractual interpretation, the parties implicitly

94. 122 ER 309 (QB 1863).

95. *Id.* at 312, 314.

96. *Id.* at 312. Justice Holmes made the same point in Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 543–544 (1903): "For instance, in the present case, the defendant's mill and all its oil might have been burned before the time came for delivery. Such a misfortune would not have been an excuse, although probably it would have prevented performance of the contract. If a contract is broken, the measure of damages generally is the same, whatever the cause of the breach."

agreed that the existence of the contractual obligation was conditional on the persistence of a certain state of affairs. In *Taylor*, the contractual obligation was implicitly conditional on the continued existence of the music hall. However, the focus on contractual interpretation and the implied condition means that there is nothing special about the fact that the unanticipated change of circumstance made performance *impossible*. For example, in Krell v. Henry,[97] Henry leased from Krell a flat along the Pall Mall in order to watch the processions for the scheduled coronation of King Edward VII. When the coronation was canceled due to the King's illness, Henry refused to pay for the flat and Krell sued. This was not a case of impossibility; Henry's obligation was to pay for the flat and that remained perfectly possible. Nevertheless, the court relied on the judgment in *Taylor* to argue that, under the circumstances, it was an implied condition of the contract that the coronation procession would take place. When the implied condition failed, the parties were discharged of their obligations.

The key point for our purposes is that the doctrine of impossibility is, and has always been, a doctrine of reasonably implied conditions. The fact that performance has become impossible does no independent work. Unless "possibility" is an implied condition, impossibility does *not* discharge the parties of their obligations. Moreover, circumstances falling short of impossibility—circumstances that merely defeat the contractual purpose—may also discharge the parties of their obligations if the nonexistence of those circumstances may reasonably be understood as a contractual condition.

It is common to say that impossibility of performance excuses the parties from their contractual obligations, suggesting that the doctrine of impossibility specifies the *nature* of the contractual obligation as an obligation to perform. The central point of the above discussion is that that is a mistake. As Lord Buckmaster argued: "There is no phrase more frequently misused than the statement that impossibility of performance excuses breach of contract. . . indeed, if it were necessary to express the law in a sentence, it would be more exact to say that precisely the opposite was the real rule."[98] The correct statement of the law relating to impossibility is that if, from an objective point of view, the parties implicitly agreed that the contract was conditional on the possibility of performance, then the existence of the contractual obligation is conditional on that possibility. If the condition fails, the obligation does not arise.

This understanding of the significance of impossibility is drawn directly from Lord Blackburn's judgment in *Taylor* and is shared by many.[99] What

97. [1903] 2 KB 740.

98. Grant Smith & Co. and McDonnell Ltd. v. Seattle Construction & Dry Dock Co., [1918–19] All ER 378, 382 (PC).

99. There are, of course, other views of the doctrine. A popular view, expressed in Capital Quality Homes Ltd. v. Colywyn Constr. Ltd., (1975) 9 OR (2d) 617 (ONCA), is that "[t]he theory of the implied term has been replaced by the more realistic view that the court imposes

hasn't been noticed is that, on this understanding of impossibility, the doctrine poses no challenge to a disjunctive contractual obligation. The doctrine of impossibility, understood as a doctrine of reasonably implied conditions, is not about the nature of the contractual obligation, but only about the conditions under which the obligation arises. The contractual obligation is to perform or pay, but it may be the case that the proper interpretation of the parties' agreement is that the contractual obligation—the obligation to perform or pay—is conditional on the persistence of a certain state of affairs.

D. The Rule Against Preexisting Duty Consideration

Consider the following fact situation. An architect refused to hand over the plans for building a brewery as required by his contractual agreement after he found out that the brewing company was going to buy its refrigeration equipment from one of the architect's competitors. The brewing company urgently needed the brewery to be built and so it offered the architect more money in the hope of persuading him to perform. The architect accepted the offer of more money and turned over the plans. When he tried to collect the additional sum he was promised, however, the brewing company refused to pay it and he sued. The court found that he could not recover the additional money he was promised because the brewing company's promise to pay more money was unsupported by consideration. In exchange for more money, the architect promised to perform, but that is what he was already obligated to do—it was his preexisting duty—under the original contract.[100]

Critics of the disjunctive understanding of the contract obligation say that the rule against the validity of preexisting duty consideration is inexplicable if the promisor's obligation is only to perform or pay.[101] As Douglas Baird puts it, "if he [the architect] had a right to refuse to perform, then he could ask to be paid for not exercising his right of refusal."[102] In other words, if there is a right to refuse to perform, then giving up the right of refusal could be fresh consideration for the offer of more money. The fact that courts say that there is no fresh consideration in a case like this suggests that the contractual obligation is not disjunctive; the architect's obligation is to perform, which is why the second promise to perform is not fresh consideration.[103]

upon the parties the just and reasonable solutions that the new situation demands." As Langille and Ripstein argue, however, the rejection of the implied term theory in favor of the imposition of an external standard of justice was a reaction to the subjectivity and artificiality of an implied term theory focused on what the parties actually had in their minds. If we ask how a reasonable person would understand the contract, we avoid subjectivity and artificiality while still holding the parties to their agreement. Brian Langille & Arthur Ripstein, *Strictly Speaking—It Went Without Saying*, 2 LEGAL THEORY 63 (1996).

100. Ligenfelder v. Wainwright Brewery Co., 15 S.W. 844 (1891).

101. Friedmann, *The Efficient Breach Fallacy*, *supra* note 3, at 19–20; BAIRD, *supra* note 3, at 52.

102. BAIRD, *supra* note 3, at 52.

103. *Id.*

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This argument misunderstands what it means to say that the law regards the contractual obligation as disjunctive. It means that, from a legal point of view, *every* promise to perform is to be understood as a promise *either* to perform or else pay to put the other party in the financial position she would have been in had the contract been performed. The architect's first contractual promise was a promise either to perform or pay and so, from the law's point of view, was his second promise. Even if the architect says "this time I'm promising that I will actually perform," from a legal point of view, that is still nothing more than a promise to perform or pay and is no different from the first contractual promise. This is perfectly consistent with a body of law that awards the expectation measure of damages even if the parties explicitly stipulate that breach will trigger a performance remedy. From a legal point of view, a promise to perform—however explicit or emphatic—is always a promise to perform or pay. So, since the architect was not bound to perform his second promise either, that promise could not be fresh consideration for the money promised him. The rule against preexisting duty consideration is thus not a counterexample to the disjunctive obligation.

E. Nominal Damages

The final doctrinal objection to the disjunctive obligation is the availability of nominal damages for breach of contract in cases where the contract has been breached but the plaintiff has suffered no loss.[104] In tort law, nominal damages signal the presence of a rights violation in cases where the plaintiff has suffered no loss. So, for example, a harmless trespass to the plaintiff's property is actionable and entitles the plaintiff to nominal damages, signaling that although she has not caused harm, the defendant has nevertheless wronged the plaintiff by entering her property without her permission. It might be thought that nominal damages play the same role in contract

104. There is an additional doctrinal objection to the disjunctive obligation. Courts have found that the executor of a deceased's estate is not obligated to breach the deceased's contract even if breaching and paying damages would be financially better for the estate than performing. Cooper v. Jarman, (1866) 36 LJ Ch. 85; Ahmed Angullia Bin Hadjee Mohamed Salleh Angullia v. Estate & Trust Agencies (1927) Ltd., [1938] 3 All ER 106. It is said that this shows that there is a right to performance, for if there was not, the executor would be bound to breach and pay damages if that was in the best interest of the estate. *See* Liam Murphy, *The Practice of Promise and Contract*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 151, 157 (Gregory Klass, George Letsas & Prince Saprai eds., 2014). But both *Cooper* and *Anguilla* were decided on the basis of a conception of the duty of a deceased's representative, not a conception of the promisee's entitlement. In *Cooper*, Lord Romilly MR argued that it was the representative's duty to carry out the deceased's intentions and that he must perform the contracts that the deceased intended to perform at the time of his death. In *Anguilla*, Lord Romer argued that the question of whether it is better to perform or breach and pay damages is speculative until a court assesses the damage award (and litigation costs are settled), and so it seems that, ex ante, it is always reasonable for an executor to perform (*Anguilla*, 3 All ER, at 115). These are judgments that pertain to the law of estates, not contract; they tell us about the executor's obligation as the deceased's representative, but tell us nothing about the contractual rights of the promisee.

law.[105] If this is correct, it threatens the disjunctive conception of the obligation, because it means that the defendant's bare failure to perform constitutes a violation of the plaintiff's rights.[106] I'll now argue that although there is a certain sense in which nominal damages play the same role in contract and tort, there is an important sense in which they do not.

Nominal damages are symbolic. They say something about the normative relationship between the plaintiff and the defendant in a case where there is no factual loss that needs to be cured. This is true of nominal damages in both contract law and tort law. But since the normative context is different in contract and in tort, we shouldn't be surprised if nominal damages signify a different normative relationship in these different contexts.

The Second Restatement of Contracts provides the following illustration of a case where nominal damages would be awarded for breach of contract. A contracts to sell B 1,000 shares of stock in Corporation X for $10 a share to be delivered on June 1. A breaches the contract, refusing to deliver the stock on that date. B sues A for breach of contract, but at trial it is established that, on June 1, B could have gone into the market and purchased 1,000 shares of stock in Corporation X for $10 a share. B will be entitled only to nominal damages.[107]

Of course, those committed to the view that the plaintiff has a right to performance will say that in this case, nominal damages function the same way they do in tort and signify that there has been a rights violation although there has been no loss. But as I have shown throughout this essay, that interpretation is at odds with numerous features of the contract remedy that suggest that the bare failure to perform is not a wrong. Moreover, a different interpretation of the nominal damage award—one consistent with the disjunctive conception—is available.

In the illustration provided by the Second Restatement, if there were no nominal damage award, the result in this case would look identical to the case where the court determined that the agreement to transfer 1,000 shares for $10 a share was unenforceable—for example, because the offer to sell shares at that price was revoked before the plaintiff accepted it. But the illustration is importantly different from a case where there is no enforceable agreement. What we have in the illustration is not the absence of an enforceable agreement but rather an agreement whose enforcement does not require a monetary payment from defendant to plaintiff. If we interpret the contract as a mutual guarantee of the parties' ownership of their properties' agreed-upon value, that guarantee has, in the illustration, been fulfilled despite the defendant's nonperformance. The defendant guaranteed that the plaintiff's $10,000 was worth 1,000 shares in Corporation X on June 1, and that was true without the need for any

105. BENSON, *supra* note 3, at 268.
106. *See, e.g.*, McBride, *supra* note 65, at 388–389.
107. RESTATEMENT (SECOND) OF CONTRACTS §346 illus. 1 (1981).

monetary payment from the defendant to the plaintiff, since the plaintiff could have gone into the market on June 1 and purchased 1,000 shares with her $10,000. In other words, on the date performance was due, the plaintiff was already in the financial position she would have been in had the contract been performed. At trial, the plaintiff therefore already has all that she is contractually entitled to.

Then why, one might ask, does the court award anything? Why does it award nominal damages rather than no damages? It does so because there is a difference between saying that the plaintiff has all that she is entitled to and saying that the plaintiff is not entitled to anything. That is the difference that nominal damages in contract law signify. Nominal damages reflect the normative difference between a court's determination that the plaintiff has *no* contractual entitlement vis-à-vis the defendant (because, for example, there is no contract) and a court's determination that the plaintiff is entitled to the enforcement of the defendant's contractual guarantee, but the guarantee is, under the circumstances, fulfilled without a monetary payment. In the contractual context, nominal damages signify that the plaintiff is entitled to what she was promised (the guarantee of her property's exchange value) but that she already has what was promised (her property has the exchange value that the defendant guaranteed). This understanding of nominal damages in contract law—as signifying the presence of a right rather than the presence of right violation—coheres with the disjunctive understanding of the contractual obligation. It underscores the fact that the disjunctive obligation is not a permission to violate a contract; it is rather an understanding, based on the independence of persons from things, of what it means to honor a contract.

V. CONCLUSION

The disjunctive theory of the contractual obligation is almost universally rejected by theorists who regard contract law as a moral rather than a purely economic enterprise. These theorists assume that the only possible justification for a disjunctive obligation in contract comes from Holmes's bad man theory of law or from the economic analysis of law and that anyone who seeks a moral justification for legal coercion must regard the plaintiff as having a right to performance. Against the disjunctive obligation's moral critics, I have argued that the disjunctive obligation can be justified on moral grounds. I have argued that from a perspective that regards human beings as free agents capable of choice and therefore independent of material objects, the contracting parties must be understood as agreeing to mutually guarantee one another's ownership of a certain value. This guarantee can be fulfilled either by handing over what was promised or by making up the difference between the market value and the contract value. The plaintiff's contractual right is therefore disjunctive—it is a right that the defendant perform or pay. The disjunctive understanding of the plaintiff's entitlement

thus makes expectation damages, the standard remedy for breach of contract, intelligible as a vindication of the plaintiff's contractual right. I have shown, moreover, that the disjunctive obligation can be reconciled with all the doctrines that others take to be decisive arguments against it—with the exceptional availability of an equitable remedy of specific performance, the tort of inducing breach of contract, the doctrine of impossibility, the rule against preexisting duty consideration, and the availability of nominal damages for breach of contract.