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ESSAY

MISREADING OLIVER WENDELL HOLMES ON EFFICIENT BREACH AND TORTIOUS INTERFERENCE

Joseph M. Perillo

Oliver Wendell Holmes's most notorious statement about contract law was that "[t]he 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 This generally has been interpreted to mean that a contracting party has a lawful option to perform or not. In this tradition, Clark Remington recently wrote: "The law has come to regard the obligation to perform a contract as being generally equivalent to an option to perform or pay damages. Holmes saw the matter this way more than one hundred years ago."2 From this

1. Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 462 (1897). Holmes recognized that this statement did not account for the remedy of specific performance, but stated that "I hardly think it advisable to shape general theory from the exception." Id. He failed to note other legal sanctions that were still available in the early nineteenth century for breach of contract; for example, jail time for runaway indentured servants. See Robert J. Steinfeld, The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870, at 3-4 (1991). In England, imprisonment of breaching employees continued until the late nineteenth century. See generally Alfred Avins, Involuntary Servitude in British Commonwealth Law, 16 Int'l & Comp. L.Q. 29 (1967) (surveying the phenomenon in the United Kingdom of criminal enforcement of labor contracts until the late 1800's). Also, corporal punishment of apprentices and "menial" servants was permitted. See Esek Cowen, Treatise on the Civil Jurisdiction of a Justice of the Peace in the State of New York 193-94 (1821). Imprisonment for debt was frequent. See Richard Ford, Imprisonment for Debt, 25 Mich. L. Rev. 24, 29 (1926) ("The number of persons imprisoned [for debt in 1830] was 3,000 in Massachusetts, 10,000 in New York, 7,000 in Pennsylvania, and 3,000 in Maryland . . . ." (footnote omitted)). The law also provided that instead of imprisonment, "[p]oor debtors may by law be assigned in service, for the payments of their debts." 1 Zephaniah Swift, A System of the Laws of Connecticut 218 (Arno Press 1972) (1795). In other words, poor debtors were impressed into debt slavery.

2. Clark A. Remington, Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher as Wrongdoer, 47
misreading of Holmes, Remington expresses a natural bewilderment, asking, “[i]f a person is free to breach a contract and pay damages, why should it be tortious for a third party to induce the contract party to do what she is free to do?”

The purpose here is not to berate Remington, whose article, despite its mistaken premise, is otherwise a fine piece of scholarship, but to point out a common misreading of Holmes’s statement, due primarily to the opacity of Holmes’s writing style. Remington is in good company. Even Holmes’s close friend and correspondent, Sir Frederick Pollock, similarly misunderstood Holmes’s point. In the eighth edition of his volume on Contracts, Pollock states:

Mr. Justice Holmes . . . suggests that every legal promise is really in the alternative to perform or to pay damages: which can only be regarded as a brilliant paradox. It is inconsistent not only with the existence of equitable remedies, but with the modern common law doctrine that premature refusal to perform may be treated at once as a breach.

In a letter written by Holmes, he chided Pollock for this passage and clarified its meaning:

I stick to my paradox as to what a contract was at common law: not a promise to pay damages or, etc., but an act imposing a liability to damages nisi. You commit a tort & are liable. You commit a contract and are liable unless the event agreed upon, over which you may have no, and never have absolute, control, comes to pass.

3. Remington, supra note 2, at 674.
4. 1 Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932, at 177 n.2 (Mark DeWolfe Howe ed. 1941) (quoting Frederick Pollock, Contracts 192 n.K (8th ed. 1911)) [hereinafter Holmes-Pollock Letters]. Pollock criticized Holmes’s view of contract—as he understood it—on other occasions as well. See, e.g., id. at 80 (discussing historical authorities that differed with Holmes’s view of contracts) (letter of Sept. 17, 1897). More recently, Richard Epstein appears to read Holmes’s “imperial” statement in the same way, but strongly disagrees with what he deems Holmes to have meant. See Richard A. Epstein, Torts 579-80 (1999). James P. Nehf, apparently reads Holmes the same way, but also with disapproval. See James P. Nehf, Contract Damages as Substitute for Full Performance, 32 Ind. L. Rev. 765, 765-66 (1999).
6. 1 Holmes-Pollock Letters, supra note 4, at 177 (letter of Mar. 12, 1911) (emphasis in original). In a similar vein, 17 years later, Holmes chided Pollock for falling victim to the persistence of the impression that I say that a man promises either X or to pay damages. I don’t think a man promises to pay damages in contract any more than in tort. He commits an act that makes him liable for them if a certain event does not come to pass, just as his act in tort makes him liable simpliciter.

2 Holmes-Pollock Letters, supra note 4, at 233 (letter of Dec. 11, 1928). Holmes's passage previously quoted in the text was written in the past tense, as if he was writing history. But, here, the language is in the present tense. In an opinion for the United States Supreme Court, however, he had stated that “[t]he old law seems to have
Thus, Holmes equates a contractual breach with a tort, which in French means "wrong." Consequently, in Holmes's view, the breach of a contract was as much an offense against the law—a legal wrong—as a tort, not the free choice that the misinterpreters of Holmes believe he advocated. Indeed, from the bench, Holmes described a breach of contract as a wrong. In his judicial capacity, he certainly had approved of the grant of expectancy damages, and had allowed a price action where the seller had deposited securities in escrow, but the buyer had refused to pay, in essence requiring specific performance at law.

What does it mean to be a wrongdoer in a legal sense? One consequence of Holmes's view, correctly interpreted, is that if you perform the contract, the state will leave you alone—tax collectors possibly excepted. If you breach, the state, if pressed by the aggrieved party, will ultimately send the sheriff to take your worldly goods, just as it would if you had committed a tort. To illustrate this point,

regarded it as technically in the election of the promisor to perform or to pay damages. *Bromage v. Genning*, 1 Roll. R. 368; *Hubert v. Hart*, 1 Vern. 133." *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 543 (1903) (first emphasis added). In the same opinion, he wrote, "[w]hen a man commits a tort he incurs by force of the law a liability to damages, measured by certain rules. When a man makes a contract he incurs by force of the law a liability to damages, unless a certain promised event comes to pass." *Id.*

7. "The word is derived from the Latin 'tortus' or 'twisted.' The metaphor is apparent: a tort is conduct which is twisted, or crooked . . . . "Tort" is found in the French language, and was at one time in common use in English as a general synonym for 'wrong.'" W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 1, at 2 (5th ed. 1984) (footnotes omitted). In law French, the word is used in such titles as Britton's chapter, *De plusours torts*. See *Tort*, in *Oxford English Dictionary* 275 (2d ed. 1989) (citing Britton, I. 77).


8. Thus, the Restatement quite properly, even under Holmes's analysis, refers to the breaching party as a "wrongdoer." *Restatement (Second) of Torts* § 766 cmt. v (1979). But see *Remington*, *supra* note 2, at 646 ("The view of breacher as wrongdoer is quite inconsistent with modern contract law.").

9. In *P.P. Emory Mfg. v. Columbia Smelting & Refining Works*, 60 N.E. 377 (Mass. 1901), Holmes, referring to a complaint that the non-breaching party failed to mitigate damages caused by an anticipatory repudiation, stated that "[u]ntil the moment when a refusal to perform is a wrong, he has a right to expect that when the time comes a wrong will not be done." *Id.* at 378 (emphasis added). Note that the term "wrong" is repeated twice in this short quotation.

10. See, e.g., *Chicago, Milwaukee & St. Paul Ry. Co. v. McCaul-Dinsmore Co.*, 253 U.S. 97, 100 (1920) ("The rule of the common law is not an arbitrary fiat but an embodiment of the plain fact that the actual loss caused by breach of a contract is the loss of what the contractee would have had if the contract had been performed . . . . "); *see also* *St. Louis Dressed Beef & Provision Co. v. Maryland Cas. Co.*, 201 U.S. 173, 180-83 (1906) (explaining the propriety of expectancy damages in an action for breach); *Speirs v. Union Drop-Forge Co.*, 61 N.E. 825, 826 (Mass. 1901) (affirming an award of expectancy damages even though plaintiff "could not prove with prophetic certainty what the exact course of performance would have been").

consider the 1765 Massachusetts Bay Colony case of Hanlon v. Thayer. In this case, judgment had been entered against Hanlon for his debts. The sheriff seized, among other things, all of Hanlon's wife's garments with the exception of what she was wearing. She brought an action of trover against the sheriff, alleging wrongful seizure of necessaries. Nonetheless, the jury found for the sheriff and assessed costs against Mrs. Hanlon. Two judges sustained the verdict. The Chief Justice, dissenting, expressed the thought that the sheriff should not have taken her clothing, and stated apologetically, "must she go naked when that [garment she is wearing] is washing?"

The case is harsh and in several respects obsolete, but it illustrates the preposterous nature of the notion that a contracting party has, or ever had, a lawfully free choice to perform or to breach. If Holmes had been on the bench, as a positivist, he certainly would have ruled with the majority for the sheriff.

What, then, did Holmes mean by his notorious statement that "[t]he 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"? Holmes's meaning eluded Pollock, who wrote:

I wish some ingenious young fellow would work out, after the manner of non-Euclidian geometry, the consequences of your contract theory if it had prevailed. I forget in what reported case somewhere about 1600 it was argued that equity should not meddle with the promisor's election to perform or pay damages.

Holmes replied:

You always have regarded my notion of contract as a pardonable

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13. See id. at 99-100 n.2.
14. See id. at 100-01 & n.3.
15. See id. at 99-100.
16. See id. at 103.
17. See id. at 102.
18. Id. at 103.
19. Otis, on the behalf of Mrs. Hanlon, argued in vain that "Hanlon never bought or paid for a single Rag of his Wife's Cloaths, but that she brought all with her at the Marriage." Id. at 102. Of course, a woman's property no longer becomes her husband's by virtue of marriage. Also, a judgment debtor's entitlement to keep necessaries has expanded.
21. The governing precedent was Hardisty and Barney, 90 Eng. Rep. 525 (K.B. 1696) ("Holt said, upon a fieri facias the sheriff may take anything but wearing clothes; nay, if the party hath two gowns, he may take one of them.").
22. Holmes, supra note 1, at 462.
23. 2 Holmes-Pollock Letters, supra note 4, at 201-02. (letter of July 11, 1927).
eccentricity (that when you commit a tort you incur a liability to
damages *simpliciter.* When you commit a contract you incur a
liability to damages *nisi,* illustrated by the fact that in most contracts
if not in all you have only a limited, and it may be no, power over
the event). It is a particular case of my general definition of a right
as the hypostasis of a prophecy—like gravitation. I should be glad if
we could get rid of the whole moral phraseology which I think has
tended to distort the law. In fact even in the domain of morals I
think that it would be a gain, at least for the educated, to get rid of
the word and notion *Sin.*

The basis of Holmes’s theory of contract was his attempt to
separate legal from moral notions. Note that, in the quotation
immediately above, Holmes points out that a breach is an objective
event over which the breacher has “limited, and it may be no, power
over the event.”25 The law, in Holmes’s view, is unconcerned with
whether or not the breach is a moral failure. Similarly, on the
question of contract formation that he discusses on the page following
his famous quotation,26 he stresses the objective theory of contract
formation: “Yet nothing is more certain than that parties may be
bound by a contract to things which neither of them intended, and
when one does not know of the other’s assent.”27 Giving effect to the
true intention of a party, he argues, would be a moral notion, not a
notion appropriate to the law of contract. Much of the essay in which
his views were expounded deals with the utility of banishing “every
word of moral significance” from the law.28 Then we could adopt a
vocabulary of legal ideas “uncolored by anything outside the law.”29

Simply put, Holmes wanted the legal system to consider violations
of contract and tort law dispassionately and objectively without a
moral coloration, but he never developed a legal vocabulary that

to this by stating:

> If the promise in a contract were held to be in the alternative—perform *or*
> pay damages—then (1) there could be no decrees for specific performance:
> (2) there would be no reason for allowing any implied exception of
> frustration or the like: (3) (and chiefly) it would not answer reasonable
> expectation of promisees. Those are my reasons: I don’t see where the
> moral phraseology comes in. No doubt it might be the law in some other
> planet.

*Id.* at 201 (June 13, 1927). In the published Holmes-Pollock letters, Holmes never
reacted to these and others of Pollock’s specific criticisms of Holmes’ theory.

25. *Id.* at 200. He had earlier expressed the same thought on the bench. In *Globe
Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903), he remarked that “a man
never can be absolutely certain of performing any contract when the time of
performance arrives, and in many cases he obviously is taking the risk of an event
which is wholly or to an appreciable extent beyond his control.” *Id.* at 543.


27. Holmes, *supra* note 1, at 463.

28. *Id.* at 464.

29. *Id.*
would dispense with words such as “wrong,” “duty,” or “right.” Holmes was, moreover, skeptical as to the reality of these legal concepts. For Holmes, these words represented predictions of how a court would view a course of conduct. He coined an ungainly term to describe his jurisprudential outlook—bettabilitarian. His skepticism about the reality of rights and duties finds little support in constitutional jurisprudence today and seems to be declining in tort theory. Although it is time for contracts theorists to consider jurisprudence in other fields, this Essay is more modest in its goals.

What is the present significance of the misreading of this idea first expressed by Holmes over a hundred years ago? The misunderstanding of Holmes has led to two different but related phenomena. First, it has become commonplace to tie the economists’ notion of efficient breach to the towering legal authority of Holmes, who is incorrectly cast as articulating the idea of a right to breach a contract. Second, some employ the authority of Holmes in the mostly academic effort to rein in liability for inducing a breach of contract. Holmes, however, was comfortable with the existence of the tort of interference with a contract and indeed is largely responsible for formulating current theory underpinning the existence and contours

30. See id. at 457-58 (stating that the object of the study of law is “the prediction of the incidence of the public force through the instrumentality of the courts”). “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law.” Id. at 461.


33. See id. at 1812-47.

34. See, e.g., Lillian R. BeVier, Reconsidering Inducement, 76 Va. L. Rev. 877, 880 (1990) (stating that holding inducers liable suppresses behavior that is likely to be socially unproductive); Donald C. Dowling, Jr., A Contract Theory for a Complex Tort: Limiting Interference with Contract Beyond the Unlawful Means Test, 40 U. Miami L. Rev. 487 (1986) (discussing a third party’s liability when interfering with a contractual relationship); Fred S. McChesney, Tortious Interference with Contract Versus “Efficient” Breach: Theory and Empirical Evidence, 28 J. Legal Stud. 131, 133 (1999) (noting the coexistence of efficient breach and the interference tort); Harvey S. Perlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine, 49 U. Chi. L. Rev. 61, 62 (1982) (arguing for an unlawful means test that restricts tort liability to those cases in which the defendant’s act is independently wrongful); Remington, supra note 2, at 649 (arguing that a court “should determine the impropriety of mere interference by looking to the nature of the breach that is caused by the interference”); James B. Sales, The Tort of Interference with Contract: An Argument for Requiring a “Valid Existing Contract” to Restrain the Use of Tort Law in Circumventing Contract Remedies, 22 Texas Tech. L. Rev. 123, 154-55 (1991) (arguing that commercial dealings do not operate effectively when challenged and are circumvented by the unpredictable results of tort remedies); Gary D. Wexler, Note, Intentional Interference with Contract: Market Efficiency and Individual Liberty Considerations, 27 Conn. L. Rev. 279, 282 (1994) (analyzing the tort of intentional interference with contract).
of the tort.\(^{35}\)

The linkage between efficient breach theory and the misunderstanding of Holmes’s theory is finding its way into the courts, albeit in fairly innocuous ways thus far.\(^{36}\) It is likely, however, to have the pernicious effect of encouraging the adoption of the efficient breach fallacy into the legal arena.\(^{37}\)

The theory of efficient breach holds that if a party breaches, and is still better off after paying damages to compensate the victim of the breach, the result is Pareto superior, which means that considered as a unit, the parties are better off because of the breach and the breach makes no party worse off.\(^{38}\) In other words, “by comparison to some original position, no one is, in his own estimation, worse off and at least one person is, in his own estimation, better off.”\(^{39}\) Consequently, the theory holds that the party who will benefit from the breach should breach.\(^{40}\)

Judge Posner, a principal proponent of efficient breach theory, has given this example of an efficient breach:

Suppose I sign a contract to deliver 100,000 custom-ground widgets


\(^{37}\)A confused student note writer recently asked why the courts have failed to implement efficient breach theory that is so thoroughly grounded in academic theory. See Craig S. Wakol, Note, Resolving the Paradox Between Legal Theory and Legal Fact: The Judicial Rejection of the Theory of Efficient Breach, 20 Cardozo L. Rev. 321, 321 (1998). The following discussion will demonstrate that such grounding is far from thorough.


\(^{40}\)Another stream of economic thought, based on the Kaldor–Hicks principle, is unconcerned whether the non-breaching party is compensated. If the net gain to the breacher exceeds the loss to the non-breaching party, the result is efficient because the world is wealthier. See Posner, supra note 38, at 14-17.
at 10¢ apiece to A for use in his boiler factory. After I have delivered 10,000, B comes to me, explains that he desperately needs 25,000 custom-ground widgets at once since otherwise he will be forced to close his pianola factory at great cost, and offers me 15¢ apiece for them. I sell him the widgets and as a result do not complete timely delivery to A, causing him to lose $1,000 in profits. Having obtained an additional profit of $1,250 on the sale to B, I am better off even after reimbursing A for his loss, and B is also better off. The breach is Pareto superior.41

From this economic analysis, Posner makes a great leap to a legal conclusion. He states:

Even if the breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided he makes good the promisee's actual losses. If he is forced to pay more than that, an efficient breach may be deterred, and the law doesn't want to bring about such a result.42

Whatever value the theory of efficient breach may have as a construct for economic analysis, at most it should be a limited tool for making normative decisions.43 Proponents of the efficient breach theory worry that "an efficient breach may be deterred," by a rule of law, "and the law doesn't want to bring about such a result."44 The law, however, does want to discourage breaches, efficient or otherwise. The law seeks to protect reliance and expectancies, and to preserve peace and tranquility. Breaches—even efficient breaches—tend not only to disappoint expectations, but also to precipitate private disputes. The legal system knows what economic science does

41. Posner, supra note 38, at 119. Posner would make an exception for an "opportunistic" breach, though he fails to define it. Dodge, however, has explained that an opportunistic breach is one that "does not increase the size of the economic pie; the breaching party gains simply by capturing a larger share of the pie at the expense of the nonbreaching party." William S. Dodge, The Case for Punitive Damages in Contracts, 48 Duke L.J. 629, 653 (1999). For an example of such a breach, see Rasnick v. Tubbs, 710 N.E.2d 750, 751 (Ohio Ct. App. 1998), discussing a case where a mechanic, who was a party to a contract to transform a vehicle into a race car, had been paid a considerable amount, but demanded $20,000 above the contract price to complete the transformation.


42. Patton v. Mid-Continent Sys., 841 F.2d 742, 750 (7th Cir. 1988) (Posner, J.).


44. Patton, 841 F.2d at 750.
not know: damages and other legal remedies are substitutes for private warfare. While economics claims to be a value-free science, the law is most distinctly not value free. On the contrary, it is an embodiment of community values, only one of which happens to be economic efficiency.

What is wrong with the efficient breach theory and why do I charge that the theory is pernicious when applied as a normative tool for legal decisions? The theory has two aspects. First, it claims to explain the existing rules of contract damages. Second, it claims to be a basis for the decisions of cases not clearly falling into the damages rules that routinely are applied. There is little basis for the idea of efficient breach theory as a basis for existing rules of contract damages. In addition, the proposition that the theory should be applied to encourage a contracting party to breach is dubious indeed. The cause of encouraging efficient breaches would sacrifice too many other values that the law holds dear.

I. DOES THE EFFICIENT BREACH THEORY EXPLAIN EXISTING RULES OF CONTRACT DAMAGES?

In general, contract damages do not fully compensate the party who is the victim of a breach. As Karl Llewellyn stated, "[a] contract is no equivalent of performance; rights are a poor substitute for goods." An official comment to the U.C.C., likely written by Llewellyn, states that "the essential purpose of a contract between commercial men is actual performance and they do not bargain.

45. See 5 Arthur L. Corbin, Corbin on Contracts § 998, at 23 (2d ed. 1964) ("[T]he chief purposes for which the remedy in damages for breach of contract is given are the prevention of similar breaches in the future and the avoidance of private war."); see also John D. Calamari & Joseph M. Perillo, The Law of Contracts § 1.4 (4th ed. 1998) ("Before courts, there was the feud—private vengeance. ... In modern law, where contract law refuses to enter, vengeance and self-help fill the vacuum."). For a concrete illustration, see infra note 96.

46. See Posner, supra note 38, at 23 (stating that economic analysis cannot define policy goals, but may still help determine efficient means of attaining these goals).

47. From the perspective of the breaching party, "it is an open secret that a contract breaker rarely stands to lose as much by his breach as he would by performance. And the more deliberate the breach, the more apt he is to gain." Addison Mueller, Contract Remedies: Business Fact and Legal Fantasy, 1967 Wis. L. Rev. 833, 835.


When parties have explicit contractual terms, they may explicitly negate the implicit option to breach on payment of expectation damages: if so, it is hard to see how a practice that is forbidden by contract could be regarded as efficient. But even when the terms are not explicit, the background norm appears to be relentless. When breaches of this sort take place within the organized trades, the opportunist is drummed out of the business as unreliable for any future dealings.

Epstein, supra note 4, at 581 (footnote omitted).
merely for a promise, or for a promise plus the right to win a lawsuit." 49 Attorneys’ fees and other transaction costs (information costs, etc.) are generally not a part of the recovery. 50 Real and sometimes enormous damages are not compensated unless the hurdles of foreseeability 51 and certainty 52 are overcome. Damages for mental distress caused by a contractual breach are not compensable. 53 Furthermore, the rule of mitigation precludes recovery of damages that were incurred but which could have been avoided. 54 Many jurisdictions fail to award pre-judgment interest and skimp on post-judgment interest. 55 The award of court costs and disbursements is often a laughable portion of actual outlays for court reporters, printing, expert witnesses, and the like. 56 Thus, typically, the rules of damages do not deter efficient breaches. Is that because the law wants to encourage such breaches? There is no evidence that this is so. Failure to deter is not the same as encouragement.

Let us examine some of the limitations on contract damages and try to understand why the legal profession crafted them. Were they designed to encourage efficient breaches? First, why did courts develop the foreseeability limitation? Before the foreseeability test was introduced in 1854 by Hadley v. Baxendale, 57 the level of economic activity in England had reach and probably surpassed that of the Roman Empire. Cases decided under the writ of assumpsit had developed into almost a full-blown law of contracts, but there were few rules for assessing damages. The standard that the reasonable expectations of the promisee should be protected, however, was well understood. As Baron Parke had stated in 1848, “where a party sustains a 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.” 58 But, as

49. U.C.C. § 2-609 cmt. 1 (1999); see also Karl L. Llewellyn, A Realistic Jurisprudence—The Next Step, 30 Colum. L. Rev. 431, 437 (1930) (“It is a heresy when Coke or Holmes speaks of a man having liberty under the law to perform his contract, or pay damages, at his option.”).


51. See Calamari & Perillo, supra note 45, § 14.5; Farnsworth, supra note 50, § 12.14; Murray, supra note 50, § 120.

52. See Calamari & Perillo, supra note 45, § 14.8; Farnsworth, supra note 50, § 12.15; Murray, supra note 50, § 121.

53. See Calamari & Perillo, supra note 45, § 14.5(b); Farnsworth, supra note 50, § 12.17; Murray, supra note 50, § 123.

54. See Calamari & Perillo, supra note 45, §§ 14.15-14.17; Farnsworth, supra note 50, § 12.12; Murray, supra note 50, § 122.


56. See, e.g., David D. Siegel, New York Practice §§ 413-416 (3d ed. 1999) (explaining the breakdown of the award of court costs and disbursements).


the old poem had it, if the blacksmith carelessly shod a horse, a kingdom could be lost. Should the errant blacksmith be liable for the loss of the kingdom? Obviously, some limits had to be placed on the liability of the breaching party whose breach unintentionally and unknowingly produced disastrous consequences.

As Holmes points out in the pronouncements quoted above, the breaching party may have “only a limited and it may be no, power over the event.” It would seem that this line of thinking—that the breaching party most likely is unfortunate and not an intentional reneger—led to the rules that limit damages for breach, rather than the thought that efficient breaches should be encouraged. The efficient breach that economists construct is intentional rather than unfortunate. The fact that the law often fails to deter efficient breaches hardly means that it seeks to encourage such breaches.

Various observers have explained the rule of Hadley v. Baxendale from different perspectives. None of them attribute the rule to the law’s desire to encourage breaches. Judge Posner, giving an economist’s explanation, justifies it as allocating the risk in the most efficient manner; the party who knows that his non-performance will cause consequential damages will exact payment for it and take extra precautions to fulfill his or her agreed task. Others, adopting a penalty-default theory, note that the rule gives the party who anticipates large losses from a potential breach an incentive to advise the promisor of those potential losses. Richard Danzig explains it as

59. In the words of Benjamin Franklin:
For want of a nail the shoe was lost;
For want of a shoe the horse was lost;
And for want of a horse the rider was lost;
For the want of a rider the battle was lost;
And all for the want of a horseshoe-nail.
Benjamin Franklin, Poor Richard’s Almanacks Preface: Note to Courteous Readers (1758). The poem, in some form, is attributed to George Herbert (1651), quoted in John Bartlett, Familiar Quotations 270 (15th ed. 1980).

60. See supra notes 24-25 and accompanying text.


easing the task of the courts and lawyers in reaching predictable results, which should be "a rule for judges caught up in their own problems of modernization." John Murray explains it as expressing a rule of justice that frees breaching parties who have not assumed the risk of special consequences of their breach from liability for those consequences. This view is quite similar to that of Posner. Allan Farnsworth's historical perspective is that "[w]ith the advent of the industrial revolution, a solicitude for burgeoning enterprise led to the development of rules to curb this discretion [of the jury] and the 'outrageous and excessive' verdicts to which it led." Each of these explanations is probably correct. Each of these perspectives shows that the decision encourages contract-making. None of them involves the thought that any kind of breach is encouraged by the law. Instead, they focus on the protection of the promise breaker from the unforeseen consequences of his or her breach and also on the institutional goal of easing the task of administering justice. Not surprisingly, the court in *Hadley* turned to Roman Law as honed through the centuries and expressed by Joseph Pothier, the French scholar, who wrote that generally the obligor "is only liable for the damages and interest which might have been contemplated at the time of the contract; for to such alone the debtor can be considered as having intended to submit."

The restriction that damages be proved with reasonable certainty is applied with greater strictness in contract cases than in tort cases. Thus, the rule of certainty, like the rule of foreseeability, encourages entrepreneurial risk taking. Indeed, in *Hadley*, defense counsel made the alternative argument that the calculation of lost profits was

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inherently speculative and therefore non-compensable,69 quoting at length from an admiralty opinion by Mr. Justice Story.70 Courts in the United States have abandoned Story's idea that profits are not susceptible to proof, but have shown a greater willingness to accept somewhat conjectural proof in tort than in contract cases.71 Nonetheless, even such a renowned damages expert as Lon Fuller accepted the analysis that courts are prone to relax the standard of certainty in contract cases where the breach is willful.72 Corbin concurs73 and the Restatement agrees.74 Willfulness is also one factor in the exercise of equitable discretion.75 It is also a factor in denying restitution to a defaulting party who brings a restitution claim.76 A willful threat to breach a contract constitutes duress where the promisee has no reasonable alternative but to submit to the

70. In an admiralty case for wrongful capture and detention of a ship, Justice Story had written, and Baxendale’s counsel had quoted:
Independent however of all authority, I am satisfied upon principle, that an allowance of damages upon the basis of a calculation of profits is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty. The calculation would proceed upon contingencies, and would require a knowledge of foreign markets, to an exactness in point of time and value, which would sometimes present embarrassing obstacles. Much would depend upon the length of the voyage, and the season of arrival, much upon the vigilance and activity of the master, and much upon the momentary demand. After all, it would be a calculation upon conjecture, and not upon facts. Such a rule, therefore, has been rejected by courts of law in ordinary cases, and instead of deciding upon the gains or losses of parties in particular cases, an uniform interest has been applied, as the measure of damages for the detention of property.
The Lively, 15 F. Cas. 631, 634-35 (No. 8,403) (C.C.D. Mass. 1812).
71. See Calamari & Perillo, supra note 45, at 554 (stating that the difference in treatment between antitrust actions in which new businesses establish lost profits and contract actions in which such profits are denied "reveals rather clearly that the standard of certainty, like the rule of foreseeability, is based at least partly upon a policy of limiting contractual risks"); see also L.L. Fuller & William R. Perdue, Jr., The Reliance Interest in Contract Damages: 2, 46 Yale L.J. 373, 373-77 (1937) (discussing situations in which the applicability of the “certainty” requirement affects the damage award); McCormick, supra note 68, at 105 (“Like the ‘contemplation of the parties’ doctrine, the standard of ‘certainty’ was developed, and has been used, chiefly as a convenient means for keeping within the bounds of reasonable expectation the risk which litigation imposes upon commercial enterprise.” (footnote omitted)).
72. See Fuller & Perdue, supra note 71, at 375 (citing Ralph S. Bauer, The Degree of Moral Fault as Affecting Defendant’s Liability, 81 U. Pa. L. Rev. 586, 592 (1933) and 1 Sedgwick, A Treatise on the Measure of Damages §§ 182-200, especially §§ 193-193a (9th ed. 1920)).
74. See Restatement (Second) of Contracts § 352 cmt. a (1981).
75. See Quigley v. Acker, 955 P.2d 1377, 1384-87 (Mont. 1998).
76. See Restatement (Second) of Contracts § 374 cmt. b. But see Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish, 230 P.2d 629, 632 (Cal. 1951) (Traynor, J.) (rejecting the argument that restitution should be denied to a party who has committed willful breach).
promisor's demands. In appropriate cases, courts will enjoin a breach, whether or not the breach would be efficient. Courts sometimes require disgorgement of the breaching party's profits as a remedy for breach even in cases in which the parties are not in a fiduciary relationship. The relevance of willfulness in these cases presents another problem for theorists of a legal rather than economic theory of efficient breach.

Because the rule of avoidable consequences is equally applicable to tort and contract damages, the existence of this restriction on the recovery of damages does not support efficient breach analysis any more than it supports efficient conversion analysis. The restriction on the recovery of damages that could have been avoided by reasonable effort is sometimes said to be a rule of causation. Perhaps it is sounder to have a rule of policy that even the victim of a tort or breach of contract passively should not suffer economic losses which the victim's reasonable efforts could have avoided. Even in this context, the willfulness of the breach can diminish the rights of the breaching party.

II. SHOULD EFFICIENT BREACH THEORY BE ADOPTED BY THE LEGAL SYSTEM?

The main focus of this Essay is the unsuitability of efficient breach analysis to the legal system. Nevertheless, a brief synthesis of some of the criticisms of the efficient breach theory from an economic perspective will be presented to round out the discussion. The theory contains simplifying assumptions that do not hold in the real world.

77. See Austin Instrument, Inc. v. Loral Corp., 272 N.E.2d 533, 535 (N.Y. 1971); see also Roth Steel Prods. v. Sharon Steel Corp., 705 F.2d 134, 147-48 (6th Cir. 1983) (stating that coercive threat to breach when seeking contract modification constitutes dishonesty and is evidence of bad faith under U.C.C. § 2-209); Calamari & Perillo, supra note 45, at 317-18 & n.11 (collecting cases where "a threat to breach a contract [has been held to] constitute[] duress if the threatened breach would, if carried out, result in irreparable injury").


79. See, e.g., 148 Investment Group, Inc. v. Elvis Presley Enters., Inc., No. 93-6444, 1995 WL 283785, at *1, *2 n.3 (6th Cir. May 10, 1995) (affirming the lower court's grant of damages in the amount equal to the total profits derived from the breach of contract).

80. See McCormick, supra note 68, § 33 (discussing the two rationales for the avoidable consequences doctrine and arguing that the policy rationale is the better theory). Another rationale is that the victim has a conflict of interest because, but for the mitigation principle, the victim would have an incentive to run up damages. See Epstein, supra note 4, § 17.7.

81. See Rice v. Community Health Ass'n, 40 F. Supp. 2d 788, 798 (S.D. W. Va. 1999) (stating that evidence of malicious termination was relevant to the question of whether the employee had a duty to mitigate).
First, it assumes the absence of transaction costs—such as the costs of negotiation and litigation. Second, it assumes a frictionless market that operates instantly. Third, it ignores genuine damages that are not compensable because of the rules of foreseeability, certainty, and avoidable consequences. In calculating whether a breach is Pareto superior, basic rules of mathematics should require that these damages be part of the calculation. Fourth, the theory leaves out idiosyncratic values and mental distress, reputational costs and the negative value of distrust fostered by the legal system that would operate as a drag on the market. Again, simple rules of arithmetic dictate that these costs be part of the calculation of Pareto superiority.

Ian Macneil has demonstrated that efficiency of the breach cannot be evaluated without detailed knowledge of the transaction costs. Moreover, he argues that it is not demonstrable that a damages rule produces greater efficiency than a specific performance default rule. Entitlement to specific performance is a property rule and the holder of the property right would, in economic theory, surrender his right by bargaining to an efficient result. Thus, in Posner's pianola illustration, A, the original buyer, would be the person with whom B, the second buyer, would bargain, and A would reap the benefit of B's willingness to pay \$1.50 per widget. The result is not inefficient; it is simply a question of who should become wealthier, the manufacturer or A, the contract purchaser. Daniel Farber, also basing his analysis largely on transaction costs, argues that "supercompensatory damages should be awarded for bad-faith breaches." Robert Birmingham even assails current damages law as inefficient because it does not fully compensate the victim. He writes: "[a]ssumed absence of transaction costs is particularly unrealistic... Efficiency demands that the breaching party bear the transaction costs which accompany his actions." Daniel Friedmann also has observed, "[t]he total level of transaction costs should accordingly be reduced when the plaintiff is provided with strong protection against breach of contract." Posner rather blandly addresses the transaction costs in the widget

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illustration. “True,” Posner observes,

had I refused to sell to B he could have gone to A and negotiated an
assignment to him of part of A’s contract with me. But this would
have introduced an additional step with additional transaction
costs—and high ones, because it would be a bilateral-monopoly
negotiation. On the other hand, litigation costs would be reduced.\(^6\)

One observer has remarked, I believe accurately, that “[i]f the
transaction costs of negotiation are compared with the assessment
costs of litigation, it becomes clear that negotiation tends to be
cheaper.”\(^7\)

From the perspective of legal analysis, wholly apart from the
weakness of efficient breach theory in economic theory, the theory is
at odds with many aspects of existing law. Even if the theory were
sound, it is clearly wrong to say that the law does not want to deter
efficient breaches. The tort of interference with a contract severely
conflicts with the notion that willful efficient breaches are desired by
the legal system. Ironically, from the standpoint of those who have
misread Holmes to the effect that performance of a contract is merely
an option, and that a breach of contract is not a legal wrong, a recent
piece of scholarship has demonstrated that Holmes (with Pollock) is
the intellectual progenitor of the modern rules on the tort of
interference.\(^8\)

What is the basis of this tort? Essentially, there are two theories,
each of which could be right, but incomplete. Richard Epstein regards
the tort as involving the appropriation of property that the interferer
wrongfully makes its own.\(^9\) Other analysts have understood the tort
in relational terms—akin to alienation of affections.\(^10\) Epstein’s
theory is appealing, but it leaves no room for two kinds of cases in
which the courts frequently have given a remedy: (1) where the
interferer did not appropriate the benefit of the contract, but
interfered to harm the victim of the tort; and (2) where the contract
was unenforceable or terminable at will. The relational perspective
explains these two classes of cases. Epstein admits that his account
leaves no room for these classes and holds that the interferer should
not be liable in such cases. Whether the property or the relational
perspective is adopted, it is clear that tort law regards the contractual

\(^{86}\) Posner, supra note 38, at 133.
\(^{87}\) Dodge, supra note 41, at 675.
\(^{88}\) See Gergen, supra note 35, at 1206-18.
\(^{89}\) See Epstein, supra note 4, §§ 21.2-21.5; Richard A. Epstein, Inducement of
Breach of Contract as a Problem of Ostensible Ownership, 16 J. Legal Stud. 1, 2-3, 19-
29 (1987) [hereinafter Epstein, Inducement]; see also Fred S. McChesney, Tortious
Interference with Contract Versus “Efficient” Breach: Theory and Empirical Evidence,
28 J. Legal Stud. 131, 140-42 (1999) (summarizing Epstein’s view of tortious
interference).
\(^{90}\) See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 129, at
bond to be something other than a mere option to perform or not. Advocates of the efficient breach theory are quite aware of this and urge that the tort be reined in so as to be available only in egregious cases. Nonetheless, the courts and the American Law Institute continue to regard the interferer as a wrongdoing accomplice of the contract breaker. There is a close analogy in tort liability for encouraging others to engage in tortious conduct.

Other rules of law are at war with the efficient breach analysis. As indicated above, the rule as to certainty of damages is relaxed when the breach is willful. This is true whether or not the breach is efficient. Willfulness also surfaces as a factor in determining whether a breach is material. Consider the following hypothetical breach. Contract specifications call for Reading brand pipe. The contractor orders Reading pipe from the supplier. The supplier calls up and says, "I can offer you a good deal on Cohoes pipe. I bought up a large quantity at a bankruptcy sale of another supplier and I can pass on a savings of 50% to you." Everyone in the trade knows that Cohoes is just as good as Reading. The contractor agrees and installs the Cohoes pipe. The owner detects the deviation from specifications only upon a final inspection. The breach is clearly efficient provided that the court in a damages action would measure the damages by the difference between the market price or the building with Reading pipe properly installed and the market value of it with the Cohoes pipe, that is, zero damages.

The contractor now presses a claim for final payment urging that there is no harm done and the contract substantially has been performed. The court that found substantial performance on similar facts—where, however, the substitution of Cohoes pipe for Reading pipe was unintentional—would have ruled against this contractor who has committed a willful yet apparently efficient breach. An attorney

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91. For a recent expression of this view, see Remington, supra note 2, at 710.
92. See Restatement (Second) of Torts § 876(b) (1979); see, e.g., Shelter Mut. Ins. Co. v. White, 930 S.W.2d 1, 3-5 (Mo. Ct. App. 1996) (holding that passengers who encouraged reckless driving are liable along with the driver to injured third persons).
93. See supra text accompanying notes 68-74.
94. See Restatement (Second) of Contracts § 237 illus. 7, § 241(e) & cmt. f (1981). But see id. at 100, Introductory note to ch. 16 (describing traditional law of contract remedies as not distinguishing between willful breaches and other breaches).
95. There are two competing measures of damages for breach of a construction contract where the breach involves a non-conformity between the structure as built and the specifications. The usual measure is the cost of correcting the defect. At times, the courts measure damages by the difference between the value the structure would have had if it were built to specifications and the value it has with the nonconformity. In the hypothetical, the first measure would produce a substantial judgment while the second measure would result in merely nominal damages. See Calamari & Perillo, supra note 45, § 14.29.
96. See Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 891 (N.Y. 1921). Three of the seven judges dissented. Certainly Cardozo, writing for the majority, would have joined them if the breach had been willful. Cardozo wrote, "[t]he willful transgressor
who might have advised his client that it was okay to use Cohoes pipe would, of course, be liable to the client for malpractice. Because the breach is willful, some courts would not only deny the contractor any recovery but would also apply a replacement cost measure of damages to a counterclaim by the owner. For example, in one case the diminution in value of the property was $3,000. Because the breach was willful, the court sustained an award of $90,000 representing the cost of completion. The burden of liability on the attorney who counseled the contractor to breach would be heavy indeed.

Should the contractor in the Reading-Cohoes pipe controversy have inefficiently refused the supplier’s proposal of a reduced price for the off-brand pipe? The answer dictated by business ethics and common sense is for the contractor to go to the owner with the news of its ability to cut costs and offer to share the benefit. The contractor is not a fiduciary and need not reveal the full extent of the savings, but to talk is not to breach. In contrast, as Macneil has written, efficient breach, encourages “breach first, talk afterwards.”

There is also tension between efficient breach theory and the willingness of the courts to grant specific performance by issuing mandatory injunctions or restraining orders. Observers in the economic analysis of law tradition are divided on the question of the efficiency of specific performance. While some analysts stress that specific performance exactly protects the expectancy interest and thus avoids overcompensation and undercompensation, others have must accept the penalty of his transgression. For him there is no occasion to mitigate the rigor of implied conditions. The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong.” Id. at 891 (citations omitted); see also VRT, Inc. v. Dutton-Lainson Co., 530 N.W.2d 619, 623 (Neb. 1995) (holding that bad faith in performance precluded a finding of substantial performance). See generally Patricia H. Marschall, Willfulness: A Crucial Factor in Choosing Remedies for Breach of Contract, 24 Ariz. L. Rev. 733 (1982) (describing the role of willfulness in the law of contract remedies and arguing for increased emphasis on this factor).


99. Macneil, supra note 92, at 968.

100. See Alan Schwartz, The Case for Specific Performance, 89 Yale L.J. 271, 274-78 (1979); Alan Schwartz, The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures, 100 Yale L.J. 369, 387-89 (1990). Compare Linzer, supra note 82, at 138 (“The general use of specific performance will produce truer economic efficiency than a system that counts the money cost of performance to the promisor but not the unquantifiable emotional and other costs of nonperformance to the promisee.”), and Ulen, supra note 39, at 365-66 (“[S]pecific performance should be, on efficiency grounds, the routine contract...
warned that the routine grant of specific performance would be inadvisable. They argue that where the cost of full performance exceeds its value to the claimant, the claimant would be in a position to exact "bribe" money for settling the case or, at any rate, that the cost of negotiating a settlement would be excessive and inefficient. But these critics tend to ignore that, in the situation where cost of performance exceeds its value, relieving the breaching party of the duty of performance would result in its unjust enrichment. Why the breaching party's savings should not inure to, or be shared by, the aggrieved party is not clear. It is apparent, however, that the courts are increasingly willing to grant specific performance, and legislators are increasingly willing to authorize such grants of specific performance.

Another take on the economics of the efficient breach theory has been put forward by William Dodge. He urges that willful breaches, whether or not efficient, should be met by the threat of punitive damages, arguing that "[t]he threat of punitive damages would simply... force[] [the breaching party] to buy its way out of the contract and would... determine[] the nonbreaching party's expectation interest more cheaply and more accurately [than a litigated result]." He recognizes that this proposed rule, like specific performance, gives the promisee a property right in the promise. The argument recognizes that the alternative of specific performance would produce an efficient result by forcing negotiations, but notes that the remedy is unavailable if the subject matter of the contract has been transferred to a bona fide purchaser for value. Penalty clauses

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104. Dodge, supra note 41, at 687.
would serve the same purpose as punitive damages, but would not
distinguish between willful and unintentional breaches.

Thus, when we examine the divergent opinions of economic
analysts of contract law we find no consensus. Nonetheless, the
premise of many of the economic analysts is almost always the same.
Most share the presupposition that the legal system is only an adjunct
to the economic system. While it is true that the legal system is an
 adjunct to the economy it is also much more. First and foremost, the
legal system's primary goal in enforcing contracts is to keep the public
peace. This is easily provable. Where illegal agreements dominate
the economic system, as in underground economies such as the
marketing of illegal drugs and loan sharking, enforcement is
activated by threats, torture, mayhem, murder, hostage taking and
other unpleasant enforcement and punishment mechanisms.

There are values that contract law serves other than promoting the
efficiency of the economic system and preserving the public peace.
Many scholars have the strong belief that morality requires the
honoring of promises. For some, the moral impetus stems from
religion. For others, natural law has a humanistic foundation in
human reason and decency. Others find the foundation of contract

105. The following newspaper excerpt provides an example of the enforcement of
an illegal drug agreement:
[T]he body of a Colombian named Diego was found on July 14 stuffed into a
suitcase beside the Grand Central Parkway. The man, who law-enforcement
officials said had been accused of withholding payment of $350,000 to a
group of drug traffickers, was found bound and gagged with duct tape. A
cord was wound around his neck, a rotting onion was taped into his mouth
and his leg had been cut with a knife.
Clifford Krauss, In Queens, Deadly Echoes of Colombia's Drug War, N.Y. Times,

106. A naïve borrower approached a loan shark for a loan and inquired what
collateral the lender might want. He was informed that “[y]our body is your
collateral.” N.Y. State Comm'n. of An Investigation of the Loan Shark Racket 11
(1965).
108. Birmingham quotes an extreme statement by St. Bernardine:
[A]ll the saints and all the angels of paradise cry then against him, saying,
'To hell, to hell, to hell.' Also the heavens with their stars cry out, saying,
'To the fire, to the fire, to the fire.' The planets also clamor, 'To the depths,
to the depths, to the depths.'
Birmingham, supra note 84, at 275-76 n.10 (quoting St. Bernardine, De Evangelio
Aeterno sermon 45, art. 3, cl. 3 in 2 Opera Omnia (de la Haye ed. 1745)). This
precious reference, however, is not about contract breakers. Rather, St. Bernardine
was condemning usurers. It is likely, however, he would have so condemned promise
breakers. See James Gordley, Contracts in General, in 7 International Encyclopedia of
Comparative Law ch 2 §§ 24-29 (1997) (detailing Roman, Medieval and Aristotelian
traditions of contract doctrine).
109. Modern proponents of a natural law basis for the enforcement of contracts,
based on Aristotelian philosophy, include Henry Mather, Contract Law and Morality
67-68 (1999) (arguing that intentional breaches should be dealt with more severely
than unintentional breaches). See also John Rawls, A Theory of Justice 342-47 (1971)
(“The obligation to keep a promise is a consequence of the principle of fairness.”).
law in the ideal of personal autonomy and the power of the will.\textsuperscript{110} My own notion is very much like that stated by Harry S. Truman in response to an interviewer's question about honoring contracts. He replied, "it has always seemed to me that unless you can trust a man and he can trust you, why, everything breaks down.... [T]rust is absolutely fundamental in every possible kind of relationship."\textsuperscript{111}

Theories abound, but as Professor Hillman has stated: "[d]espite its many dimensions, contract law is a credible, if not flawless, reflection of the values of the surrounding society. A highly abstract unitary theory illuminates contract law, but it cannot explain the entire sphere."\textsuperscript{112} Despite differing views as to "Why?" most theorists agree that the protection of reasonable expectations is the fundamental goal of contract law; the award of damages is not the equivalent of meeting those expectations. The business community rejects efficiency as an excuse for willful breaches,\textsuperscript{113} and the legal community should also.

This Essay does not take the position that efficient breach theory is unsound for reasons of morality. The law does not enforce all promises. The breach of some unenforced promises may be more immoral than most of those for which the law grants a remedy.\textsuperscript{114} For better or for worse, the law has decided that certain kinds of promises create rights and has provided remedies for the protection of those rights. While there is continuous need to reexamine the criteria for enforceability of promises, a promise that at any moment is enforceable should not be subverted. Once the legal system decides

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\textsuperscript{110} See Gordley, supra note 108, at §§ 20-39 (discussing nineteenth century will theory).


that a given kind of promise is enforceable, the promise takes on many of the attributes of property.115 This property is protected from interference by third persons116 and against impairment by the state.117 More often than not, it is also assignable.118 The promisee's property-like interest should strongly be protected from appropriation by the promisor.

CONCLUSION

This Essay makes several points. It seeks to clarify a frequently misunderstood statement by Holmes that many have taken to mean that performance of a contract is a mere option to the payment of damages. It notes that there is strong disagreement among academics that look at law from an economic perspective as to the validity of the theory of efficient breach. The main conclusion, however, is that, regardless of the soundness of efficient breach theory in economic science, it is not, and should not be, the basis of normative determinations in the legal system.

115. For example, in the case of a merger or acquisition by an asset purchase agreement, it is quite common to list the outstanding significant contracts of the acquired company and a value is placed on such contracts. Consider, too, the relatively free assignability of contract rights. See Calamari & Perillo, supra note 45, § 18.10, at 680 (“The modern view is emphatically to the effect that rights are ordinarily assignable.”). Freedom of alienation of property is one of the earmarks of the shift from feudalism to capitalism. Free alienability of contract rights is perhaps the last step in that property reform.

116. It is perhaps anomalous that tort law sometimes protects unenforceable contracts. This anomaly perhaps can be explained by the fact that the victim of the tort may have sunk significant resources in the unenforceable deal. See Epstein, Inducement, supra note 89, at 23-24.

117. See U.S. Const. art. I, § 10, cl. 1.

118. See Calamari & Perillo, supra note 45, § 11.10, at 680.