

MUST I MEAN WHAT YOU THINK I *SHOULD* HAVE SAID?

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*T*HE *Myth of Efficient Breach: New Defenses of the Expectation Interest* responds to criticisms of the default expectation damages remedy by arguing that critics misunderstand the content of the relevant contract.¹ Despite the authors' admirable display of ingenuity, I am unpersuaded. I will first take some time to reframe their argument and to situate it in the context of disputes over the efficient breach. Then I will offer some reasons why I find their interpretative maneuver unpersuasive.

I. SITUATING MARKOVITS AND SCHWARTZ'S
INTERPRETATIVE CLAIM

Critics of the default expectation damages remedy argue that its reflexive, default application may be inappropriate in some cases, such as those of intentional, opportunistic contractual breach in non-exigent circumstances. Consider cases like the following: Supplier, who has promised widgets to Buyer in exchange for payment, reneges because Widget Enthusiast has a sudden craving for an immediate infusion of widgets and is willing to pay Supplier triple the standard price. So Supplier reneges and accepts Enthusiast's offer. Widget Buyer is entitled to expectation damages: the sum that would put Widget Buyer in the position she would have been in had Supplier

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¹ Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 Va. L. Rev. 1939, 1948 (2011) ("Our argument rests on an old idea, to which we give a new name: the 'dual performance hypothesis.' . . . The hypothesis holds that contracts typically impose alternative obligations on the promisor: *either* to supply goods or services for a specified price *or* to transfer to the promisee the gain the promisee would have made had those goods or services been supplied.").

performed, for example, the difference between the contracted-for price and the price of the alternate supplier, if it is greater, plus any consequential damages Buyer incurred from the delay and other costs incurred in covering. Even if Supplier voluntarily pays Buyer expectation damages without Buyer having to resort to litigation, some critics object to the *result* of this standard remedy. Through this remedy, the law objectionably permits Supplier to retain the gain from breach, despite the fact that Supplier broke a promise to Buyer merely for Supplier's personal gain, rather than awarding Buyer some of the surplus, permitting Buyer to demand specific performance, and/or awarding Buyer punitive damages.²

Other critics, like me, focus not predominately on the result per se, but rather register a related complaint about a prominent *reason* that remedy is often endorsed. My primary objection to the adoption of the expectation damages remedy, as opposed to other alternatives, is on the grounds that that remedy is preferable *because* it facilitates efficient breaches.³ That is, on my view, the law should not recognize as an argument for a remedial response to breach that it would encourage contractors to breach merely because it is in their financial interest to do so and will leave (in theory) the promisee no worse off financially.⁴

² See, e.g., Richard R.W. Brooks, The Efficient Performance Hypothesis, 116 Yale L.J. 568, 572–73 (2006); Melvin A. Eisenberg, The Disgorgement Interest in Contract Law, 105 Mich. L. Rev. 559, 559, 570 (2006); Daniel Friedman, The Efficient Breach Fallacy, 18 J. Legal Stud. 1, 2–4 (1989); Frank Menetrez, Consequentialism, Promissory Obligation, and the Theory of Efficient Breach, 47 UCLA L. Rev. 859, 879–80 (2000).

³ Seana Valentine Shiffrin, The Divergence of Contract and Promise, 120 Harv. L. Rev. 708, 730–33 (2007) [hereinafter Shiffrin, Divergence]. This reason-based characterization differs, therefore, from the characterization of my view by Markovits & Schwartz, *supra* note 1, at 1996. If a better reason is not available to defend the expectation damages remedy, I would then oppose its implementation, in light of its effects and the effects of the companion doctrine of mitigation, in some circumstances such as those of intentional opportunistic breach. Seana Shiffrin, *Could Breach of Contract Be Immoral*, 107 Mich. L. Rev. 1551, 1551, 1566–68 (2009) [hereinafter Shiffrin, *Could Breach*].

⁴ Nearly everyone finds litigation costs and the inability to recover attorneys' fees a major thorn in the side of the claim that the expectation damages remedy yields Pareto-superior or fair results. Cf. Markovits & Schwartz, *supra* note 1, at 1997 & n.107 (noting that mitigation costs like "emotional upset, hours spent finding another contract partner—may go uncompensated" and that the expectation remedy "sometimes [is] undercompensatory"); Steven Shavell, *Why Breach of Contract May Not Be*

That appeal to self-interest and that roughly consequentialist approach to fidelity are incompatible with the morality of promising and generate three major difficulties. First, that rationale is in tension with contract law's explicit adoption of the promise as the cornerstone of contract; the latter honors the significance of promises, whereas the former dishonors a core feature of them, namely that they (generally) are to be kept, unless excused by the promisee, even if better opportunities for the promisor later arise. Second, whether or not the law should enforce moral behavior *as such*, the endorsement of this rationale by the state fails to accommodate citizens' moral agency because it is a *justification* that moral citizens could not accept consistently alongside their moral commitments.⁵ Third, legal institutions should not be guided by reasons that, if they were adopted by citizens, would strain the moral and cultural foundations of a thriving polity by, for example, undermining relations of trust and rendering promissory relations more dilute, fraught, or unstable.⁶

The crux of these objections is that neither the expectation damages remedy nor its prominent rationale respond appropriately to a breach of promise, and in particular to an intentional, opportunistic breach of promise.⁷ Markovits and Schwartz argue that these criticisms are misguided and emanate from a misunderstanding of the content of the contract. Critics assume that the widget contract commits Supplier *to send the widgets* to Buyer. Markovits and Schwartz do not contest that contracts involve promises. Nor do they contest that contract law should take promises seriously as such.⁸ Instead, they insist that critics misconstrue the content of the promise forged through the contract. In their view, what is called "breach" is not really *breach* at all; at least not when what transpires is merely that Supplier fails to provide the widgets to the Buyer as contracted for. They contend that the contract

Immoral Given the Incompleteness of Contracts, 107 Mich. L. Rev. 1569, 1575 (2009); Shiffrin, Divergence, *supra* note 3, at 723.

⁵ Shiffrin, Divergence, *supra* note 3, at 717–19, 731–33.

⁶ *Id.* at 713–15.

⁷ Of course, many breaches, efficient or not, are not prompted by opportunism. The normatively appropriate remedy for them may differ, depending on the reasons and circumstances for breach. But, because Markovits and Schwartz's argument does not hinge upon the reasons or circumstances of non-performance, I will focus on the case driving much of the criticism: the case of intentional, opportunistic breach.

⁸ See, e.g., Daniel Markovits, Contract and Collaboration, 113 Yale L.J. 1417, 1420 & n.4 (2004); Markovits & Schwartz, *supra* note 1, at 1953.

is better interpreted as a dual performance (or, I might say, “disjunctive performance”) contract to “perform or pay,” or, in their language, to “trade or transfer.”⁹ When Supplier pays Buyer’s cover costs, Supplier has in fact performed and so, has not really breached at all.¹⁰ If Supplier has not really breached at all but has performed the (implicit) disjunct of the commitment, then the outrage of critics at Supplier’s behavior is misplaced because there has been no promissory infidelity and hence no reward nor aim to reward untrustworthy behavior.¹¹

This general orientation that a contract to perform is in essence a commitment to “perform or pay” may seem reminiscent of Justice Holmes.¹² Arguably, though, Justice Holmes was making less a semantic claim about how to interpret the contract’s underlying promissory commitment and more a claim about the bottom-line expectations about what the law’s enforcement arm would deliver, or the practical upshot of a contract from the bad man’s strategic perspective.¹³

What is most innovative in the article is the argument Markovits and Schwartz offer for their interpretative claim that a contract to “deliver 3000 cases of widgets,” to “paint the house on Pico Boulevard for \$5000 by the end of July,” to “cut Client’s hair on Tuesday at 5,” etc., are abbreviated expressions of the underlying commitments. The true commitments are to “deliver 3000 cases or transfer the monetary equivalent,” to “paint the house or transfer any monetary losses incurred from delay and in hiring a replacement,” and to “cut Client’s hair or pay any damages associated with failure and/or finding another

⁹ Markovits & Schwartz prefer “trade or transfer” to the more common “perform or pay” because, in their view, paying the expectation value of the activity contracted for is one way to engage in performance on the contract, so the familiar expression is misleading. Markovits & Schwartz, *supra* note 1, at 1987 I find “trade or transfer” misleading in another way, however. Many objects of a contract do not involve “trade” in its common, connotative sense as much as they involve some sort of activity or service. “Trade” makes it sound as though we are necessarily thinking of goods, often fungible, and not services, where particularity, personal interactions, and timing may matter a good deal. Hence, I prefer the more familiar “perform or pay.”

¹⁰ *Id.* at 1948.

¹¹ *Id.* at 1987.

¹² Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 462 (1897).

¹³ Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 Fordham L. Rev. 1085, 1086–87 (2000); see also Ian Ayres & Gregory Klass, *Promissory Fraud Without Breach*, 2004 Wis. L. Rev. 507, 512–13 & n.15; Markovits & Schwartz, *supra* note 1, at 1981.

barber.” Markovits and Schwartz argue for their interpretation of the content of the contract by contending that alternative remedial schemes would be worse for the promisee.¹⁴ Buyer would be no better off in a regime in which the contractual commitment was interpreted to consist solely of “perform” or “supply” and in which the Buyer had the ability, through an injunction, to negotiate with Supplier over the surplus gained from a potential secondary sale. In a competitive market with good information about future contingencies, if Suppliers had to forego the opportunities associated with what I will call “secondary sales” like that to the Enthusiast, the transaction costs of negotiating with Buyer, and the shared surplus would lead Suppliers to charge higher prices for the initial contract with Buyer. Such higher prices would leave Buyer no better off and, given transaction costs,¹⁵ would leave her financially worse off than Buyer would be in an expectation damages regime.

This argument might be thought to lead to the contention that we should opt for an expectation damages regime as a remedial approach to breach. What renders their argument unusual is that Markovits and Schwartz take the further step and claim that this argument shows that because a contract with the structure “trade or transfer” would be financially as good or better for both promisors and promisees than a contract with the content “trade” in a system without a default expectation damages remedy, we may conclude that the contract *they have actually made* that says (only) “perform” (or “trade”) actually bears the *content* “perform or pay” (“trade or transfer”).¹⁶ Further, we may impute the intention to the buyer to agree that “trade or transfer” constitutes the seller’s obligations because the buyer contracted at a lower price that s/he should understand is available only because the structure is “perform or pay.”¹⁷

Their interpretative claim about the content of the contract and not merely the preferability of an expectation damages remedy is crucial to their response to critics of the efficient breach rationale. Markovits

¹⁴ Markovits & Schwartz, *supra* note 1, at 1950–52.

¹⁵ *Id.* at 1962.

¹⁶ *Id.* at 1976 & n.55.

¹⁷ *Id.* at 1954–56, 1980–81, 1984–89.

and Schwartz advance a number of criticisms of their opponents; for purposes of brevity, I will focus on the ones directed at me.¹⁸

Among my objections both to encouraging efficient breach and also to presumptively interpreting the contractual term to read “perform or pay” (or “trade or transfer”) when the parties do not explicitly specify that disjunctive is that either arrangement allows the seller to elect that the buyer either be disappointed or find cover even when the buyer prefers performance (“trade”) full stop and reasonably believes she contracted for performance (“trade”) full stop.¹⁹ This imputed power to the seller is peculiar because the buyer cannot, prior to the contract, compel the seller to engage in contractual relations, even if it would be in the seller’s monetary interest or at least financially as good as the seller’s current position. Indeed, the buyer cannot force the sale even if we could show that the sale would be one that rational maximizers would form. If the buyer cannot compel the seller to transfer when the seller chooses not to (even if this is a financially irrational move by the seller), why should we allow the seller to compel the *buyer* to cover or suffer the losses associated with failure to do so? Why should we favor a contractual interpretation that assumes that the buyer would *not* have a set of preferences about performance (trade) as such that matches the structure of the seller’s presumed preferences that we protect by blocking involuntary, albeit optimal contracts? Whereas the contract is supposed to represent a voluntary relation between parties, the efficient breach argument permits the seller to dictate the terms to the buyer and to unilaterally shift to the promisee the task of securing a substitute performance.²⁰

Against these concerns, Markovits and Schwartz first reiterate that the correct interpretation of the contract is to “trade or transfer,” so the seller is just selecting a disjunct the buyer already implicitly agreed to, rather than forcing an option onto the buyer that the buyer did not elect. Moreover, at least in the ideal case, any costs associated with mitigation are included in the transfer payment and the costs associ-

¹⁸ Gregory Klass addresses other important issues in his excellent companion piece, *To Perform or Pay Damages*, 98 Va. L. Rev. 143 (2012).

¹⁹ Shiffrin, *Could Breach*, supra note 3, at 1564–67 (responding to Steven Shavell, *Is Breach of Contract Immoral?*, 56 Emory L.J. 439, 453–56 (2006)); see also Shavell, supra note 4, at 1579–80.

²⁰ Markovits & Schwartz, supra note 1, at 1997; Shiffrin, *Could Breach*, supra note 3, at 1564–65.

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ated with the exposure to the risk one may have to mitigate are also factored into the price of the contract. Second, they contend that I illegitimately assume that a promise transforms the arm's-length relation between parties into a cooperative relation of sharing that I then argue the expectation remedy undermines.²¹ But, as a companion paper of Markovits's argues, the beauty of promises is that they constitute respectful recognition between parties who stand at arm's length and convey that respect without replacing their distance with a hug.²²

This second contention, however, depends on the first. If the relevant promise is to *perform* (or trade), then the protected efficient breach enlists the promisee to do the work of the promisor and allows the promisor to reap benefits that the promisee by right has the normative power to forbid; whereas if the relevant promise is to "perform or pay," then the remedial scheme and the efficient breach just play out what the parties have already agreed to.

II. IS THEIR INTERPRETATIVE STRATEGY PERSUASIVE?

This impasse renders it quite significant how Markovits and Schwartz's interpretative argument proceeds. I am perplexed about their interpretative strategy and why the authors think it is legitimate to move from their model of what *remedial* scheme would be preferable to imputing particular content into the actual contracts people make here and now. I will raise three difficulties for their argument.

²¹ Markovits & Schwartz, *supra* note 1, at 2000. For what it is worth, I contest this interpretation of my view. As they note, I do not make this claim explicitly. *Id.* at 1996. I disagree that my position implicitly commits me to this vision. All I claim is that the promise involves the voluntary transfer of a right to decide how to act, a right that is normally one's own, and that it requires voluntary compliance with that commitment. That is, promisors are responsible for respecting the boundaries of the right to decide otherwise (to choose something other than to perform the activity they have contracted to do) that they have transferred to the promisee. This idea is not tantamount to claiming the promisor is in a sharing relationship with the promisee or that the promisor becomes the general partner, agent, or the fiduciary of the promisee; neither is it tantamount to claiming that the promisor should subordinate other interests of his in preference to the promisee's, although such forms of sacrifice are often involved in "sharing relationships."

²² Daniel Markovits, *Promise as an Arm's Length Relation*, in *Promises and Agreements: Philosophical Essays* 295, 303 (Hanoch Scheinman ed., 2011) ("[E]ven if promising can serve as a useful *instrument* in establishing intimacy, it is *in itself* inimical to intimacy. . . . Promises prototypically do not promote intimacy, but rather an arm's length relation.").

I will elaborate on what I take to be puzzling through an example. We make an agreement that you will paint and I will pay you for your materials and labor. Our explicit agreement mentions the performance of painting and the performance of return payment. What we explicitly say is “paint”—that is, “*perform*” full stop, (or, in their terms, “*trade*” full stop). We do not say “paint or pay damages,” for example, “perform or pay damages,” (or, “trade or transfer”). Markovits and Schwartz seem to think that nonetheless we *meant* “paint or pay” because *ex ante*, if given the choice, rational, maximizing contractors in a competitive market with excellent information and a wide range of choices would select the remedy of payment rather than specific performance. Therefore, we should infer that when *we* say “paint” in exchange for money, that we meant “paint or pay.”

The interpretation fails to jibe with the legal system’s own understanding of what constitutes breach. More importantly, the inference from their model to their interpretation is strange for two reasons: one concerning the role of remedies in the argument and one concerning the gap between the model’s ideal contractors and us.

*A. Breach as Non-Performance or as Non-Performance or
Failure to Transfer*

As an interpretation of what actual (rather than model) contractors do, Markovits and Schwartz’s hypothesis renders mysterious the basic terminology and elements of a contract damage suit.²³ To establish a suit for damages, the complainant alleges breach by showing there was a valid contract and the promisor did not perform (or trade). The promisee does not need to show both that the promisor did not perform and that the promisor did not pay (or that the promisor did not trade *and* did not transfer). Failure to perform is sufficient to establish breach. If the *actual* terms were disjunctive as Markovits and Schwartz

²³ For the most part, Markovits and Schwartz do not claim to challenge the basic structure of contemporary contract law and claim their interpretation is a natural one to assign to parties operating in our contemporary legal system. They do, however, endorse the possibility of punitive damages for bad faith breach, for example, in cases in which a party knowingly breaches, does not pay expectation damages, and contests liability. Markovits and Schwartz, *supra* note 1, at 1988–89. It is unclear why they do not also show a willingness to endorse specific performance of the trade term as a remedy in such cases, assuming it is not a personal services contract. Should it not matter, on their own view, whether the promisor’s failure to perform/trade was in fact the economically superior choice at the time of breach?

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suggest, however, then it would seem as though the complainant would have to show both omissions to establish breach. True, voluntary payment of full expectation damages would often suffice as a *defense*,²⁴ but the fact that the law merely requires proof of non-performance and places emphasis on non-performance is some evidence that it regards the relevant term as “perform” and its omission as sufficient for breach.

Perhaps their view is that this structure either is misguided or that, for practical purposes, it correctly places emphasis on the omission that most naturally needs proof; had payment occurred, suit would be unlikely. In any case, two main issues I wish to raise concern their transition from their model to their interpretation.

*B. Inferring from the Model: Preferring a Remedy Versus
Choosing a Term*

First, Markovits and Schwartz’s model, if successful, shows that a background expectation damages remedy would be the preferable remedial system for contractors to select if all they cared about were their individual financial interests (and if they were able and eligible to select a remedial scheme in case of breach). Why should we infer that the actions of a remedial scheme preferable to the contractors, but administered by others, therefore become incorporated into the body of the contractors’ own commitments?

After all, remedies represent a *social* reaction to a legally germane event. Remedies are not choices individual contractors make prior to breach. A remedy has a social meaning. It encapsulates and expresses a public judgment. That meaning would be undermined by its being dictated or chosen by the very parties whose conduct is the object of the social reaction. The social nature of remedies helps to explain why our freedom to designate remedies is highly constrained and why our attempted designations may be taken to represent mere suggestions about an appropriate remedy.²⁵ Thus, it is odd to think that we would regard the expectation remedy as a part of *our* terms since remedies

²⁴ But see *infra* note 26 and accompanying text (discussing how failure of payment of liquidated damages obstructs other forms of remedies except where parties *explicitly* contracted for alternate performances).

²⁵ See, e.g., U.C.C. § 2-718 (2010); Restatement (Second) of Contracts §§ 356, 361 (1979); Shiffrin, *Divergence*, *supra* note 3, at 708, 734–36.

are not strictly speaking *our choices*. Likewise, it is odd to think that a preference about a remedial scheme translates into a commitment to contractual terms.

Indeed, it seems telling that the law does not reflexively regard the content of liquidated damages clauses as alternative performance terms, although these clauses *are* explicitly elected by the parties.²⁶ If their explicit remedial suggestions are not automatically read into the content of the contract, why then think that the parties reflexively incorporated the effect of the socially imposed remedy they should prefer on certain idealized assumptions, even though they do not, in fact, have the power to elect that remedy?

Of course, if carefully crafted, the parties could achieve the equivalent result through the explicit specification of alternative performances, which *ex hypothesi*, the parties did not engage in. Much of our dispute has to do with the significance of framing and whether the boundaries between remedies and contractual content are fluid or have more impermeability, despite delivering similar results. Contract law exhibits a preference for explicitly identifying alternative performances as such.²⁷ This makes some sense. On my view, remedies are social reactions and so are not subject to direct dictation by individual parties. Where the same result is articulately structured as a form of performance, that sort of private commandeering of the social

²⁶ See, e.g., Restatement (Second) of Contracts § 361 cmt. a (1979) (“Merely by providing for liquidated damages, the parties are not taken to have fixed a price to be paid for the privilege not to perform.”); see also *Chung, Yong Il v. Overseas Navigation Co.*, 774 F.2d 1043, 1055 (11th Cir. 1985) (observing that voluntary payment of liquidated damages or retention of a deposit as specified in a liquidated damages agreement is ordinarily not considered performance on the contract and may not discharge the contractual obligation); *Bauer v. P.W. Sawyer*, 134 N.E.2d 329, 333–34 (Ill. 1956) (refusing to interpret a liquidated damages clause in a covenant not to compete as an alternative performance term because it was not so designated); *Manchester Dairy Sys. v. Hayward*, 132 A. 12, 16–17 (N.H. 1926) (holding that an injunction is available where a party committed not to act even where liquidated damages are stipulated unless the stipulation “clearly appear[s] to be an alternative” performance and acknowledging that performance may be “the very gist” of a contract); *Karpinski v. Ingrassi*, 268 N.E.2d 751, 755 (N.Y. 1971) (finding that a contractually provided promissory note for \$40,000 payable upon breaching an agreement not to compete did not preclude an injunction); *Diamond Match Co. v. Roeber*, 13 N.E. 419, 423–24 (N.Y. 1887) (distinguishing between a bond given manifestly as the price of non-performance (for example, non-trade) and the case where “performance of the covenant [not to compete] was intended,” and allowing an injunction even where a bond for liquidated damages was provided).

²⁷ See *supra* note 26.

role of remedy is not at stake, even though the end financial result may be the same. Further, the actual commitments between the parties are made more transparent and are less subject to ambiguity or mutual confusion.

C. Inferring from the Model: Hypothetical Terms in Rarified Circumstances Versus Actual Terms

Second, even assuming “perform or pay” or “trade or transfer” would be the bargain some types of contractors would rationally craft, why think that in fact *we* have made it? After all, we actually said “*p*.” We could have said “*p* or *q*,” but we did not.²⁸ That, perhaps, we should have said “*p* or *q*” does not mean that we did say it, especially because it would be relatively simple to designate alternative performances.²⁹ As I acknowledge, in effect, specifying alternative performances would (abstracting from litigation and transaction costs) yield quite similar results in terms of financial value upon non-performance as would specifying “*p*” where an expectation damages remedy would be levied. Still, that does not mean that “*p*” amounts to a designation of alternative performances—to actually committing to the term “perform or pay” or “paint or pay damages.”

The interpretative jump from what hypothetical contractors would have said to what we did say is rendered more problematic by the fact that there is little more in our actual legal environment that we could have done other than saying “*p*” and “*p*” alone to convey that we meant just “*p*” (i.e., “perform” full stop) and not “*p* or *q*” (“perform or pay”). After all, usually contractors cannot designate alternative remedies to expectation damages. For example, assuming we meant just “*p*,” we could not have specified that failure to *p* should be penalized or should yield a specific performance remedy. It would not be misleading or pointless, however, for us to have gone to the trouble to

²⁸ See Restatement (Second) of Contracts § 361 cmt. b (1979) (distinguishing between some liquidated damages clauses and “fix[ing] a price for the privilege not to perform” and noting that “there is no reason why parties may not fix such a price if they so choose”); see also *Bauer*, 134 N.E.2d at 332–33 (noting that “an agreement may be so formulated as to give an option to perform the contract or pay the stipulated damages” and finding that absent an explicit formulation, the contract should be interpreted to demand that the defendant not compete full stop); *Davis v. Isenstein*, 100 N.E. 940, 941–42 (Ill. 1913) (providing an example of a liquidated damages clause explicitly structured to serve as an alternative performance).

²⁹ Shiffrin, *Could Breach*, supra note 3, at 1568.

articulate explicitly “*p* or *q*” as alternative performances if that is what we meant. Such an explicit statement would generate an even higher presumption against the imposition of a specific performance remedy of the trade term were conditions otherwise favorable to the imposition of specific performance.³⁰ Yet, we did not say “*p* or *q*.” So, why is “*p* or *q*” a reasonable interpretation of what the parties meant when they said only “*p*”?

It is true that the law of contracts regularly imputes default terms to parties that they did not explicitly voice. But the regular incorporation of default price terms, delivery methods and locations, warranties, etc., into incomplete contracts is a different matter than the attribution of “perform or pay” to parties who explicitly articulated a commitment to “perform.” In the normal case where default terms are used, the parties have failed to specify a term of any kind; by strongly entrenched (and often codified) custom or law, those lapses are filled in by strongly entrenched (and often codified) customary or statutory default terms. In this case, the parties have specified a term, *p*; there is no need to gap-fill. In some cases, as with warranties, the default term aims to serve the interests of the more vulnerable party, the less experienced party or non-repeat player, or to further general social interests. Those claims have no purchase here. Moreover, the attribution of default terms standardly operates with respect to subsidiary terms, not the central matter of the contract. Finally, there is no strongly entrenched, codified custom that *p*, that is, perform, is to be understood as *p* or *q* (perform or pay). At the very least, that is precisely what is at issue here.

Importantly, some contractors may reasonably prefer “*p*” over “*p* or *q*,” even if “*p*” does not yield the best economic bargain. In other words, actual parties may not conform to the highly narrow assump-

³⁰ See, e.g., *Edge Group WAICCS L.L.C. v. Sapir Group L.L.C.*, 705 F. Supp. 2d 304, 322 (S.D.N.Y. 2010) (reiterating that specific performance may still be available as a remedy even when the parties have a liquidated damages agreement unless the parties expressly provide that liquidated damages serve as an exclusive remedy). See generally Restatement (Second) of Contracts § 361 cmt. b (1979) (“[P]arties who merely provide for liquidated damages are not taken to have fixed a price for the privilege not to perform, [but] there is no reason why parties may not fix such a price if they choose. If a contract contains a provision for the payment of such a price as a true alternative performance, specific performance . . . may properly be granted on condition that the alternative performance is not forthcoming. But if the obligor chooses to pay the price, equitable relief will not be granted.”).

tions that they behave solely as rational profit maximizers and that they perform those roles well. Even purely self-regarding parties may value different things than profits or utilities. One party, for example, may value a specific outcome, like a freshly painted house, more than its financial equivalent because, to put it simply, she wants the house painted, not a fatter bank account or the financial resources to get the house painted another week (including the like opportunity to be given a financial settlement when that falls through too). Why does she care uniquely about getting her house painted at a particular time rather than its financial equivalent? Perhaps she just wants the house painted at a time when it will not interfere with other activities. She might also have non-self-regarding motives. Perhaps she cares about aesthetic values or she aims to show reciprocity toward her neighbors who have also engaged in activities to spruce up the block. A wad of cash that may or may not elicit performance by another contractor (rather than another payment) at a later date will not achieve these ends.³¹

Another party may value the normative power and reliability associated with a promise to “perform” full stop. If promisees have the power to command and excuse performance, they can make appropriate coordinating plans responsive to prospective action or performance, rather than payment. They stand empowered and not in the passive position of waiting to see which option will be chosen.³²

These possibilities explain why a promisee might wish for a promise to “perform” full stop rather than a promise to “perform or pay.” A promisor may wish to give that promise to show and cultivate good will or because the promisor isn’t purely self-regarding and actually wishes to give the promisee what she seeks.

Given these issues, why not think that the better interpretative strategy is to look at what people actually said (and perhaps what they

³¹ *Armstrong v. Stiffler*, 56 A.2d 808, 810 (Md. 1948) (“Normally contracts are made to be performed, not to give an option to perform or pay damages. . . . Forfeiture and damage clauses are means to insure performance, not optional alternatives for performance.”); see also Restatement (Second) of Contracts § 361 cmt. b (1979) (distinguishing between contracts that allow for payment of a price “as a true alternative performance,” and those with liquidated damages provisions that may not reasonably be so interpreted and that are, therefore, compatible with specific performance awards); Shiffrin, *Could Breach*, supra note 3, at 1564–65.

³² Ayres & Klass, supra note 13, at 513; Shiffrin, *Could Breach*, supra note 3, at 1564–67.

think they said), rather than at what the model suggests they should have said? Markovits and Schwartz clarify that their focus is on commercial transactions rather than promises to make dinner, but this encompasses quite a lot, including consumer transactions, garden variety contracts with plumbers and painters, and real estate transactions, as well as covenants not to compete.³³ Markovits and Schwartz really seem to have in mind not just commercial transactions, but also equally situated, high-flying, commercially and legally savvy transactors. It is unclear why all of contract law interpretation and damages should be structured around their specialized understanding. This suggests their defense of the expectation interest is more limited than they represent. Even if Markovits and Schwartz are correct to think that commercial business people are the central figures in contracting and that they contract to maximize financial gain, why shouldn't those business people specify what they mean, to be clear, especially since such specification is not difficult?

On the other hand, Markovits and Schwartz's interpretative strategy collapses the distinction between "perform" and "perform or pay" and overrides what people actually say in favor of what they should have said had they behaved as well-functioning narrow rational profit maximizers. Even if "perform or pay" is an accurate shorthand for (all) commercial contractors' meaning,³⁴ the conflating approach

³³ Markovits & Schwartz, *supra* note 1, at 1954, 2008.

³⁴ Of course, it is not clear that it is or should be. See, e.g., Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 *Mich. L. Rev.* 1724, 1749–52 (2001) (describing strong moral expectations of commercial contractors); Curtis Bridgeman & John C.P. Goldberg, *Do Promises Distinguish Contract from Tort?*, 45 *Suffolk U. L. Rev.* (forthcoming 2012) (manuscript at 17–18); David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 *Harv. L. Rev.* 373, 392–94 (1990) (describing moral expectations of commercial contractors ranging beyond their legal expectations); Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 *Mich. L. Rev.* 633, 637 (2010); Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 *J. of Empirical Legal Stud.* 405, 421 (2009); see also Andrew Ross Sorkin, *Too Big To Fail* 501–03 (2009) (describing the personal outrage experienced by Vikram Pandit, the Citigroup CEO, when after a deal had been struck with Wachovia, Wachovia took a better offer from Wells Fargo despite the recognition by all parties that Wachovia would be subject to suit and legal remedies). The Citigroup example is discussed helpfully in Bridgeman & Goldberg, *supra*, at 18. As I have discussed elsewhere, it is also unclear that it is desirable to encourage commercial contractors, as a general matter, to take the stance that performance and payment are entirely fungible. See Shiffrin, *Divergence*, *supra* note 3, at 742–47.

eliminates the opportunity for contractors with different or mixed aims to specify their expectations in a natural and straightforward manner, at least where expectation damages are the default remedy. The minimal convenience of the abbreviation for commercial contractors does not seem worth precluding or obstructing the ability of other contractors who have an interest in specifying performance as such from conveying that in natural, straightforward, and clear language. That Markovits and Schwartz's interpretative method reduces and complicates expressive opportunities for contractors with (ex hypothesi) minority but unobjectionable tastes seems like a difficulty for their position. Given its interpretative implausibility, the dual performance hypothesis seems like a convoluted, epicyclic way to defend the expectation damages remedy.³⁵

Indeed, contrary to their contention that my position presupposes and enforces an inappropriate sharing relation between the parties,³⁶ Markovits and Schwartz's position may be vulnerable to that allega-

³⁵ For other reasons, it still remains unclear how this defense of the expectation interest connects to the general defense of the expectation damages remedy. On their view, properly understood, the expectation damages remedy is really a specific performance remedy because it enforces one of the disjuncts, namely the "pay" or "transfer" alternative. Even given their explanation, it remains mysterious why *that* is the obvious remedy the legal system offers and not perform (or trade)—the other disjunct. That is, an important lacuna remains about why one disjunct should be clearly favored over another.

Take a case that involves a good faith dispute about a different matter of interpretation or about whether a valid excuse for the failure to perform (trade) pertained. Suppose the defendant loses. What should the remedy be if the dual performance hypothesis is correct? If the performance was to happen at time "*t*" and neither it nor compensatory payment ensued at "*t*" or thereafter, what is the relevant remedy given that neither of the dual performances ensued?

Prior to breach, the promisor could elect whether to perform or pay, but how does it follow *ex post*, that either that option should still lie with the promisor or that a court should direct damages in particular? Why? At the time of judgment the promisor may prefer payment to performance, but given a finding of breach, why should this preference matter over the promisee's preference to the contrary? Why would the dual performance hypothesis, or the argument behind it, support expectation damages, in particular, *as a remedy*? Why would it do so even in those cases the model does not engage with, cases where there is no other opportunity for the promisor to pursue, but where breach occurs because of a dispute about terms? How, in the end, does the dual performance hypothesis support the expectation damages remedial regime? Gregory Klass has a longer discussion of this issue in his companion piece, *To Perform or Pay Damages*, 98 Va. L. Rev. 143, 145–47 (2012).

³⁶ See Markovits & Schwartz, *supra* note 1, at 2000–01; *supra* note 21 and accompanying text.

tion. By imputing to the parties the content of an agreement they did not explicitly make, but *should* have made or *would have made* were they well-performing rational maximizers, they preclude the possibility that seller just negotiated badly or offered a lower price than he should have. By using the price (rather than the words of the contract) as an indicator of what the parties agreed to, Markovits and Schwartz's interpretation favors the seller and grants the seller an opportunity he may have failed to bargain for. This sort of charitable interpretation comes at the expense of the buyer and, in essence, forces the buyer to shoulder the expense of seller's possible imprudence or failure to maximize.

D. Does the Contract Price Signal the Intention to Express a "Perform or Pay" Term?

Markovits and Schwartz contend that the actual price contains in it a signal that the terms are "perform or pay" and not "perform" because that price is lower than the price would be if rational maximizers anticipated a remedy that was more demanding than expectation damages.³⁷ By choosing to make a contract with a price that reflects the benefit of the expectation damages remedy, the parties are choosing to incorporate "pay expectation damages upon non-performance" as an alternative performance into the terms of their contract.

This argument seems unconvincing. As I have discussed, contemporary contractors do not have a meaningful choice between the two different options Markovits and Schwartz's model considers (a world with an expectation damages remedy and a world with a harsher remedial scheme). The fact that a low price is coupled with a mandatory expectation damages remedy does not actually tell us that the contractors *meant* "perform or pay" or that that objective intent is reasonably attributed to them. They may instead have meant "perform" but because of the legal structure that resists alteration of the remedy, the price of the "perform" contract is influenced by the expected, but not chosen, payout of breach. That does not mean, however, that the parties should (even objectively) be thought to intend that the contents and consequences of the remedial system become incorporated into

³⁷ Markovits & Schwartz, *supra* note 1, at 1952 ("Buyers/promisees thus would have an incentive to write liability rule contracts because these generate higher net pay-offs.").

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their terms. It is odd to think they did given that the remedial scheme's contents are not directly the possible object of adjustment and contracting and because even indirect efforts at adjustment through liquidated damages clauses may be constrained.

Anticipating an effect of non-performance and adjusting a price in light of that potential effect are not the same as intending to leave the option of non-performance open. Similarly, a vendor may adjust her prices given the predicted rate of shoplifting at her store and the expected payout of insurance. As theft rises her prices may rise. However reasonable, that does not mean that she consents to the theft or its possibility. Nor does it mean that consumers who buy the goods at those prices consent to the thievery or to pay on behalf of the thieves. They may understand that everyone must shoulder the burden imposed by thieves and, in effect, pay the thieves' way, but finding that remedy reasonable does not amount to (and should not amount to) consenting to the activity giving rise to the remedial reaction. Thus, it seems difficult to impute actual (objective) intent where the parties have no clear mechanism to indicate an alternative intent and where they may just be reacting to an unchosen and unrebuttable feature of the legal environment.³⁸

Parties who do wish alternative performances may specify so rather easily. The default interpretative stance that one does not commit to alternative performances unless one says so leaves open greater opportunities for diverse contractors to convey their actual, permissible, but potentially disparate intents than the interpretative posture adopted by Markovits and Schwartz. Further, assuming parties intend to commit only to perform full stop if they say "perform" full stop and that they only commit to alternative performances if they say so has the additional virtue of heightened transparency.

³⁸ As the authors acknowledge, the attribution of intent becomes more complicated when the actual parties do not know how much the alternate price would be and may be unaware of the legal system's remedial powers. Markovits & Schwartz, *supra* note 1, at 1970 ("Promisees have no conscious intention regarding other terms, such as the default remedy term. These become relevant only when a party rejects trade. Sellers facing inattentive promisees have an incentive to offer liability rule contracts at property rule prices . . ."). That is, most buyers may be unaware of what a lower price conveys. Where the input affecting the price is mandatory so no other price reflecting an alternative input is available, it is unclear what would trigger their recognition other than legal advice.

Moreover, the attribution of the implicit intention to commit only to disjunctive performances is not fully charitable to the parties. Markovits and Schwartz's position exhibits charity to contractors who engage in the scenarios usually labeled efficient breach by framing their behavior in a way that is consistent with their taking promises and promissory fidelity seriously. But the price is high. It involves attributing to the parties the rather crabbed motives of rational maximizers, an attribution true of some contractors on some occasions but not true of all. Their position also involves imagining that parties issue rather thin promises that fail to provide promisees with a secure commitment to a course of action. Part of the underlying virtue and value of promises is that promises transfer, rather than hoard, discretionary power. The "perform or pay" promise, however, retains a good portion of that discretion. Where the promisee is not really seeking insurance in case of non-performance, but rather goods or services, this disjunctive promise is rather shabby and second-rate. It is not clear it serves our moral culture, as a default rule (whether mandatory or rebuttable), to encourage promisors to make only this thinnest of commitments. Further, it seems uncharitable to presume that they do.