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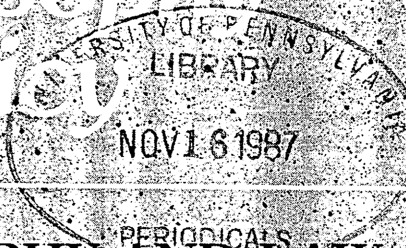
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are wronged and harmed on balance by them. These prohibitions would be legitimate only when an interest-connected nongrievance evil is extreme. This result appears to be a departure from the strict letter of the liberal's doctrine, but I have claimed that it accords with the animating humane spirit of that doctrine. Similarly, I concluded, wrongful life suits against a biological parent could conceivably be legitimate, even for harms that are not worse than nonexistence. That is partly because in the civil, as opposed to the criminal law, a party may be justly answerable for another's harmful condition, even though that condition is not, strictly speaking, his doing.

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CONTRACT REMEDIES AND INALIENABLE RIGHTS*

By Randy E. Barnett

I. INTRODUCTION

Two kinds of remedies have traditionally been employed for breach of contract: legal relief and equitable relief.[1] Legal relief normally takes the form of money damages.[2] Equitable relief normally consists either of specific performance or an injunction – that is, the party in breach may be ordered to perform an act or to refrain from performing an act.[3] In this article I will use a "consent theory of contract" to assess the choice between money damages and specific performance. According to such a theory, contractual

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[1] Legal relief was relief available in "courts of law." Equitable relief was extraordinary relief originally available from the King, then from the King's Chancellor, and finally from the Chancery courts or "courts of equity." See Dan B. Dobbs, *Handbook on the Law of Remedies* (St. Paul, MN: West Pub. Co., 1973), pp. 24–34 (describing the historical development of courts of equity and the distinction between legal and equitable relief); E. Allan Farnsworth, *Contracts* (Boston: Little, Brown & Co., 1982), pp. 818–824 (same). These were not, however, the only court systems that coexisted in England. See Harold Berman, *Law and Revolution* (Cambridge, MA: Harvard U. Press, 1984), p. 10 (stressing the importance of competing courts to the Western legal tradition).

[2] The historical picture is not quite this clear-cut. For one thing, medieval English common law courts may not have had as strong a preference for money damages as is commonly assumed. See Frederick Pollock and Frederic Maitland, *The History of English Law, Vol. II* (London: Cambridge Univ. Press, 2d ed., 1898), p. 595 ("[E]ven when the source of the action is in our eyes a contractual obligation, the law tries its best to give specific relief.") For another, during most of the medieval period, the effective remedy for breach of most contracts in the common law court was enforcement of a penal bond. See generally, A. W. B. Simpson, *A History of the Common Law of Contract* (Oxford: Oxford Univ. Press, 1975), pp. 88–125. Thus, every sort of obligation could be reduced to a monetary one or a "debt" by the party in breach. Beginning in 1283, a debtor's liability to pay could be enforced by imprisonment; see Simpson, p. 87.

[3] A variety of different contractual remedies have traditionally been available – for example, replevin, reformation, recission, cancellation, or specific restitution. See D. Dobbs, *Handbook*, pp. 1–3; E. Farnsworth, *Contracts*, pp. 815–816. Damages, specific performance, and injunctions, however, are the types of remedies most commonly used to *enforce* a contract. In contrast, recission and cancellation are used to *avoid* enforcement of a contract and reformation is used to *change* the terms of a contract.

obligation is dependent on more fundamental entitlements of the parties and arises as a result of the parties' consent to transfer alienable rights.[4]

My thesis will be that the normal rule favoring money damages should be replaced with one that presumptively favors specific performance unless the parties have consented to money damages instead. The principal obstacle to such an approach is the reluctance of courts to specifically enforce contracts for personal services. The philosophical distinction between alienable and inalienable rights bolsters this historical reticence, since a right to personal services may be seen as inalienable.

I will then explain why, if the subject matter of a contract for personal services is properly confined to an alienable right to money damages for failure to perform, specific enforcement of such contracts is no longer problematic. Finally, I shall consider whether the subject matter of contracts for corporate services is properly confined to money damages like contracts for personal services, or whether performance of corporate services can be made the subject of a valid rights transfer and judicially compelled in the same manner as contracts for external resources.

II. REMEDIES FOR BREACH OF CONTRACT

1. The Present Law Governing the Choice of Contract Remedies. The present rule governing legal and equitable remedies can be simply stated: Legal relief – money damages – is available as a matter of right. Equitable relief – specific performance or injunction – is available at the discretion of the court upon a showing by the party seeking enforcement that legal relief is somehow "inadequate." Put another way, money damages are the presumptive form of remedy for breach of contract. Specific performance orders and injunctions are exceptional forms of contract remedies. While the rules governing the choice of remedies can be complex,[5] the following summary should suffice for purposes of this discussion.

Money damages are said to be inadequate when they fail to fully compensate the victim of the breach, as, for example, when the item contracted for is "unique" and therefore unavailable from another source, or when the amount of monetary damages is difficult to prove. Traditionally, land is presumed to be unique and specific performance has therefore come to be the presumptive form of relief in such cases. For contracts involving other

[4] See Randy E. Barnett, "A Consent Theory of Contract," *Columbia Law Review*, vol. 86 (1986), pp. 269–321.

[5] Two excellent articles describe in some detail and critically assess the present law governing this subject. See Anthony Kronman, "Specific Performance," *University of Chicago Law Review*, vol. 45 (1978), pp. 351–382; Alan Schwartz, "The Case for Specific Performance," *Yale Law Journal*, vol. 89 (1979), pp. 271–306.

types, of property, the burden traditionally has fallen on the victim of the breach to prove uniqueness of unavailability. Finally – these rules and presumptions notwithstanding – specific performance has traditionally been unavailable to enforce contracts for the provision of personal services, even if these services can be shown to be unique and damages therefore are in fact inadequate.

Courts have given two reasons for their reluctance to award specific performance. First, they have sought to avoid the task of administering specific performance decrees.[6] It is sometimes difficult for a court to monitor the quality of performance or to assess claims that performance is not being appropriately provided.[7] Second, specific performance decrees for breaches of personal services contracts have been thought to pose moral problems as well, "because they are perceived to be substantively unacceptable limitations on personal freedom."[8] Forcing someone to perform a contract strikes courts as involuntary servitude and is said by judges to be against "public policy."[9]

Finally, a fundamental premise of contract damages has traditionally been that, while victims of a breach should be fully compensated for the injury caused by the breach, they should not be *over*compensated – that is, they should not be placed in a better position than they would have been in had the contract been performed. If most victims would be completely and more efficiently compensated by money damages, and if specific performance was generally perceived by contract breakers as a more onerous sanction, then there is a risk that a general presumption favoring specific performance

[6] But see Schwartz, "The Case for Specific Performance," pp. 292–296 (disputing the claim that specific performance decrees generally and unavoidably create administrative problems).

[7] Partly for this reason courts have been somewhat receptive to imposing injunctions on parties in breach. "Instead of ordering that the act be done, as a court would in granting specific performance, the court orders forbearance from inconsistent action." E. Farnsworth, *Contracts*, p. 824. For example, a person who promised to work for another might be barred from obtaining alternative employment elsewhere. In the analysis that follows, I shall not separately consider such orders. If a contract itself specifies that the party in breach should refrain from performing a given act — as it did in the famous injunction case of *Lumley v. Wagner*, 1 DeG. M. & G. 604, 42 Eng. Rep. 687 (Ch. 1852) — then an injunction is a form of specific performance. If there is no such term (either expressed or implied-in-fact) in the agreement then there is no consensual basis for such relief.

[8] Kronman, "Specific Performance," p. 372. See also Schwartz, "The Case for Specific Performance," pp. 296–298 (discussing specific performance and liberty).

[9] See E. Farnsworth, *Contracts*, p. 838 (specific performance "may be refused on the ground that, though the act or forbearance that would be compelled is not against public policy, the use of compulsion to require that act or forbearance is against public policy.") A "public policy" rationale usually obscures rather than illuminates the true reasons for a judicial decision. While the involuntary nature of court-ordered labor or "servitude" is obvious, it is less clear exactly why such an order is unjustified when the commitment being enforced was originally consensual. In Part III, the philosophical distinction between alienable and inalienable rights will be employed to provide support for this longstanding judicial sentiment.

would give many if not most victims the ability to extort a premium in return for accepting money damages.[10]

2. Problems With the Present Approach. Given that no system of proof is perfect, the allocation of the burden of proof has an important effect on allocating the costs of error.[11] The current approach to contract remedies places two burdens on victims of breach. First, to receive money damages, victims must prove with a fair degree of certainty that an injury has in fact been sustained and that the injury has a determinate value. But it may sometimes be difficult to prove what injuries have been sustained or to place an accurate monetary value on those injuries which can be proved. Therefore, a fully compensatory judgment may be hard to obtain.[12] In contrast, by giving the victim what he bargained for, specific performance may in many cases better assure that the victim is fully compensated.

Second, to get specific performance, victims must somehow prove that money damages are inadequate. When money damages are in fact inadequate, but inadequacy cannot be proved or the court errs in assessing the evidence, the victim of breach suffers under the current approach. Suppose instead that the burden was reversed and the party in breach had to show why damages were adequate. With such a rule, the party in breach would suffer when damages are in fact adequate, but proof of adequacy cannot be made out or the court errs in assessing the evidence.

The burden of proving the existence of a contract and the fact of breach is properly placed on the victim of a breach. But when the victim has met these twin burdens and it comes time to choose among remedies, justice would seem to require that – as between the party who has been proved to have breached a contract and the innocent victim of the breath – the former should bear the greater risk of adjudicative error.

Moreover, a requirement that all victims of breach (except breaches

[10] See Schwarz, "The Case for Specific Performance," pp. 284–291 (explaining the alleged problem with such *ex post* negotiations and questioning its significance).

[11] The phrase "costs of error" refers to "enforcing contracts that should not be enforced and . . . not enforcing contracts that should be enforced." Richard A. Epstein, "Unconscionability: A Critical Reappraisal," *Journal of Law and Economics*, vol. 18 (1975), p. 300. Such errors of judgment are an inevitable product of using general rules of conduct, burdens of proof, and fallible factfinding. For example, by requiring more evidence that a contract existed before granting relief, fewer "false" contracts will be erroneously enforced. At the same time, however, more "true" contracts will erroneously go unenforced. Conversely, by making the burden of proof less stringent, fewer "true" contracts will erroneously go unenforced and more "false" contracts will erroneously be enforced. See generally, George Sher, "Right Violations and Injustices: Can We Always Avoid Trade-offs?" *Ethics*, vol. 94 (1984), pp. 212–224.

[12] See Schwartz, "The Case for Specific Performance," p. 276: "[I]n many cases damages actually are undercompensatory."

involving land) show that money damages are inadequate may conflict with the reasonable expectations of many, if not most parties to contracts. Persons with common sense – that is, those who have not taken a first-year contracts class (or been counseled by a lawyer who has) – would naturally assume, for example, that when a good is purchased the purchaser obtains a right to the good. They would not assume that the seller has an *option* to deliver or pay damages – if damages can be proved – unless the victim can prove that the good is unique.

When such persons enter a contract, the terms of their bargain are unlikely to reflect the increased risk of enforcement error that, unbeknownst to them, contract law imposes on them. This becomes a problem when one party *is* knowledgeable about contract law and obtains the commitment of the ignorant party at a lower price than would be obtained if the rules of contract remedies better comported with common sense. While some disparity of information between parties is inevitable and irremediable, information disparities concerning the law of contract itself should be minimized.

Finally, placing the burden of showing inadequacy of damages on the victim of a breach means that those victims who need specific performance must pay a higher price to obtain justice than those victims requiring only money damages – a burden that is magnified in a legal system that does not compensate successful parties for their legal expenses. One reason for such discrimination might be higher costs associated with enforcing a specific performance decree. But enforcement costs will not necessarily be higher for some categories of contracts – for example, contracts calling for the delivery of identifiable goods.[13]

Why not, then, simply reverse the presumption? Why not make specific performance the presumptively favored form of relief as some have proposed?[14] Notwithstanding the problems of administration and overcompensation discussed above, giving all victims of breach a presumptive right to specific performance might, on balance, be preferable to the present rule. Given the often serious problems of assessing the true extent of injuries arising from contract breaches and the other inefficiencies of obtaining contractual enforcement through the legal system, victims of breach would be better protected by a rule making specific performance more generally available.[15] And by having chosen to break their contracts, parties in breach

[13] See *ibid.*, p. 294. (When efficiency gains of specific performance are included in an analysis of its costs, "it is impossible to say whether these gains would exceed the increase in administrative and judicial opportunity costs that the availability of specific performance would engender.")

[14] See, e.g., *ibid.*

[15] *ibid.*, p. 291. "[E]xpanding the availability of specific performance would produce certain efficiency gains: it would minimize the inefficiencies of undercompensation, reduce the need for liquidated damage clauses, minimize strategic behavior, and save the costs of litigating complex damage issues."

can be said to have brought upon themselves whatever difficulties a reversal of the presumptive remedy would create.

There is one important obstacle to such a reversal. Such a rule would seem to at least presumptively require the specific enforcement of personal service contracts. Even if an "exception" of the sort that currently exists were created to exempt such contracts from specific enforcement, many judges are understandably reluctant to respect *ad hoc* and vague "public policy" limits on their power to grant relief to apparently deserving victims. As a result, when personal services are unique (as they often are) and money damages are therefore truly inadequate, courts are always sorely tempted to compel performance.[16]

We might, however, resolve this obstacle to specific performance if we better understood why specific performance is appropriate in contracts involving the sale of goods and inappropriate in contracts involving personal services. In the balance of this paper, I hope to show how a "consent theory of contract," which looks to an underlying theory of entitlements to explain contractual obligation, assists such an understanding.

III. A CONSENT THEORY OF CONTRACT

A property rights conception of entitlements suggests that rights are best construed as enforceable claims to acquire, use, and transfer resources in the world – claims to control one's person and external resources.[17] A consent theory of contract specifies that an enforceable contract requires the satisfaction of at least two conditions. First, the *subject* of a contract must be a morally cognizable right possessed by the transferor that is interpersonally transferable, or "alienable."[18] Second, the holder of the right must *consent* to its transfer.[19] Thus, commitments will generally be enforced only if they manifest to the promisee the promisor's assent to transfer rights.[20]

[16] See, e.g., De Rivafinoli v. Corsetti, 4 Paige Ch. (N.Y.) 264, 270 (1833) (". . . a bird that can sing and will not sing must be made to sing.")

[17] See Randy E. Barnett, "Pursuing Justice in a Free Society: Power v. Liberty," *Criminal Justice Ethics*, vol. 4 (Summer/Fall, 1985), pp. 50–72 (discussing the possible basis and scope of a property rights conception of entitlements); and "Contract Scholarship and the Reemergence of Legal Philosophy" (book review), *Harvard Law Review*, vol. 97 (1984), pp. 1223–1245 (attempting to place recent interest in entitlement theories in a historical context).

[18] In contrast, the *object* of a contract is the purpose of the contract, what the parties hope to accomplish by entering into a contract.

[19] A more extended discussion of this conception of contractual obligation can be found in Barnett, "A Consent Theory of Contract."

[20] Two other ways of expressing this concept of contractual obligation are "a manifestation of an intention to be legally bound" or "a manifestation of an intention to create legal relations." Such expressions, while useful, do not stress the entitlements-dependent nature of contractual relations. Note also that there are certain instances where a consent theory would favor subjective assent over a manifestation of assent. See Barnett, "A Consent Theory," pp. 307–309.

The fact that there must be a consent to transfer *rights* suggests that the issue of contractual enforceability could potentially turn on one of two inquiries into the subject matter of the contract. First, are the rights that are allegedly being transferred to the promisee in fact held by the promisor?[21] For example, a contract to transfer rights to goods that are owned by someone else would not ordinarily be enforceable because the transferor does not possess the rights she purports to transfer.[22]

Second, unless we conclude that every right is potentially transferable, it would also be appropriate to determine whether the rights that are the subject of a purported transfer agreement are the *kinds* of rights that *can* be transferred. In other words, in determining the enforceability of an agreement, the presence of consent to transfer rights, while a necessary element of a contract, is not a sufficient ground to enforce a commitment. In certain cases, it may also be important to discern whether the rights-transfer being consented to involves *alienable* or *inalienable* rights.[23] For if the right to personal services, for example, is inalienable, then such a right cannot be made the subject of a valid, enforceable rights transfer.

IV. INALIENABLE RIGHTS

1. Defining Inalienable Rights. The distinction between alienable and inalienable rights has been widely discussed in recent years.[24] To characterize a right as inalienable is to claim that the consent of the right-holder is insufficient to extinguish the right or to transfer it to another.

> That which is inalienable . . . is not transferable to the ownership of another. So an inalienable right is one that may never be waived

[21] While I use the standard terms "promisor" and "promisee" in the text, a consent theory is inapposite to a promise theory of contract. Compare the alternative definitions of consent, *supra* note 17, which speak of "*legally* bound" and "*legal* relations" with the definition of a promise found in the *Restatement (Second) of Contracts* (St. Paul, MN: American Law Institute Pub., 1981), §2(1): "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." And the authors of the *Restatement* deny that a manifested commitment to be *legally* bound is essential to a contract. See *Restatement*, §21: "Neither the real nor apparent intention that a promise be legally binding is essential to the formation of a contract. . . ." Thus, a consent theory is distinct from most discussions of contract that emphasize the moral duty to keep one's promises; see Barnett, "A Consent Theory," pp. 304–305.

[22] Once a contract has been performed, the legal system has come to favor those who purchased goods in "good faith" over the original title holder. This issue is somewhat distinct from whether the purchaser can *enforce* such an agreement when the promisor fails to perform and, as such, is beyond the scope of this essay.

[23] A purely promise-based theory would have difficulty explaining the source of such a distinction.

[24] Much of the recent legal literature was stimulated by Guido Calabresi and A. Douglas Melamed's seminal article, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," *Harvard Law Review*, vol. 85 (1972), pp. 1089–1128.

> or transferred by its possessor. . . . Thus what is proscribed by inalienable rights are certain *relationships* or *agreements*.[25]

Such a claim must be distinguished from a claim that a right is forfeitable. "A person who has forfeited a right has lost the right because of some offence or wrongdoing."[26] It has been noted that one who wishes to extinguish or convey an inalienable right may do so by committing the appropriate wrongful act and thereby forfeiting it.[27] But notwithstanding the "consensual" nature of such an action, it is the wrongfulness of the right-holder's act and not the consent that justifies the conclusion that an inalienable right has been forfeited.

> When a person has forfeited a right, others are permitted to treat him in a way that would otherwise be inappropriate *simply because* of his *wrong actions*. But when a right has been waived, others are permitted to behave in an otherwise unacceptable manner *simply because* of the *consent* of the original possessor.[28]

2. Four Reasons for Inalienability. There are several reasons why consent might be insufficient to extinguish or transfer certain rights. First, the nature of individual rights might rule out the alienation of certain of these rights. It is usually maintained than an important part of what having a right entails is that others have a duty to refrain from violating that right. But if a person must respect the rights of others, then that person may not be able to alienate the rights he possesses that provide the *means* by which he is able to respect the rights of others.

To illustrate this, suppose *A* consents to an arrangement under which he will always unquestioningly follow the commands of *B*. If such a consensual arrangement were legally and morally binding, then *A* would violate *B*'s rights by refusing to do what *B* commands; *A* would be wrong to so refuse. Suppose, now, that *B* orders *A* to violate the rights of *C*. If such a commitment was considered to be a binding transfer of rights, two important moral consequences result.

First, *A* no longer has the right to act on his own assessment of the rightfulness of a given command. In other words, *A* no longer has the moral means to respect the rights of *C*.[29] If the transfer from *A* to *B* is valid, then *A*

[25] Terrance McConnell, "The Nature and Basis of Inalienable Rights," *Law and Philosophy*, vol. 3 (1984), p. 43 (emphasis in original).

[26] *ibid.*, p. 28. See also Joel Feinberg, *Rights, Justice and the Bounds of Liberty* (Princeton, NJ: Princeton Univ. Press, 1980), pp. 240–242; and Diane T. Meyers, *Inalienable Rights: A Defense* (New York: Columbia Univ. Press, 1985), pp. 13–15.

[27] See Meyers, *Inalienable Rights*, p. 14.

[28] McConnell, "The Nature and Basis," p. 28 (emphasis in original).

[29] See Arthur Kuflik, "The Inalienability of Autonomy," *Philosophy and Public Affairs*, vol. 13 (1984), p. 286 (if the original agreement "is valid, then the autonomy-abdicating agent has no right to object, let alone to refuse.")

cannot be liable for the violation of *C*'s rights. If liability exists, it must be limited to *B*.[30] Second, there is now a conflict of rights. *A* would be acting wrongfully if he respected *C*'s rights (thereby violating *B*'s rights) and would also be acting wrongfully if he failed to respect *C*'s rights.

The validity of the first consequence is undermined by the moral principle that "ought implies can." If a person has a duty to respect the rights of another, then a person also has a right to do so. As long as the duty exists, the right must also exist, so the right to so act may not be transferred to another by consent. There would appear to be something morally defective about a theory that failed to hold a competent person responsible for his actions simply because that person had consented to shift responsibility to another.[31]

The validity of the second consequence is undermined by the "compossibility" requirement of a coherent theory of rights. That is, for logical and functional reasons, a system of rights may not recognize two conflicting rights as valid.[32] One of the alleged rights here cannot be valid, and the conflict may be resolved in one of two ways. First, we could conclude that because the original arrangement is binding, either *C* really had no enforceable right against *A* in the first place, or *C* lost his right upon the making of the contract between *A* and *B*. Second, we could conclude that the original agreement between *A* and *B* cannot be binding – that is, some of *A*'s rights are inalienable – because such a rights transfer would conflict with the valid rights of *C*.

Any rights theory that supported the rights claim of *C* (as most theories would) would have to deny the validity of the contract between *A* and *B*. Any rights theory that resolves the conflict in this way must also conclude that persons cannot alienate the right to control all of their future actions.[33] No

[30] I thank George Smith for first suggesting to me this analysis and example.

[31] Cf. Jean-Jacques Rousseau, *The Social Contract and Discourses*, trans. G. D. H. Cole (New York: J. M. Dent & Sons Ltd., 1973), p. 170:

> To renounce liberty is to renounce being a man, to surrender the rights of humanity and even its duties. . . . Such a renunciation is incompatible with man's nature; to remove all liberty from his will is to remove all morality from his acts.

[32] See Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), p. 199 ("Individual rights are co-possible; each person may exercise his rights as he chooses."); Hillel Steiner, "The Structure of a Set of Compossible Rights," *Journal of Philosophy*, vol. 74 (1977), pp. 767–775 (arguing that compossibility is a logical requirement of a system of rights); Barnett, "Pursuing Justice," p. 58 (adding functional concerns to Steiner's logical analysis).

[33] It might be argued that the analysis in the text does not describe inalienable rights — that is, rights a person has that cannot be transferred to another by consent — but, instead, describes actions that *A* may not perform because neither *A* nor his master *B* has the right to so act in the first place. In other words, *A* need not violate *C*'s rights because neither *A* nor *B* have the right to violate the rights of another. This is true, but to recast the example in this way is to omit the issue unavoidably raised by the hypothetical agreement: Is *A*'s right to control his own person and respect *C*'s rights — a right that *A* indisputably starts with — a right that can be transferred? The analysis in the text suggests that the answer to this question is no. Notwithstanding any agreement he may have made to *B*, *A* is still under a duty to respect *C*'s rights. *A* cannot, therefore, alienate such complete control of his future actions to anyone.

matter what A and B have agreed to, A must retain the right to respect the rights of C.

The first reason for inalienability shows that the claimed distinction between alienable and inalienable rights is a plausible one. However, any agreement to obey the *lawful* (or rights-respecting) orders of another would survive the analysis thus far presented. Another reason why some rights might be inalienable would be the literal impossibility of the commitments that certain rights transfers entail. This second reason for inalienability would have far more sweeping consequences than the first.

If rights are enforceable claims to control resources in the world and contracts are enforceable transfers of these rights, it is reasonable to conclude that a right to control a resource cannot be transferred where the control of the resource itself cannot in fact be transferred. Suppose that A consented to transfer partial or complete control of his body to B. Absent some physiological change in A (caused, perhaps, by voluntarily and knowingly ingesting some special drug or undergoing psychosurgery[34]) there is no way for such a commitment to be carried out.

True, A could conform his conduct to the orders of B, but he would still possess control over his actions and would have to willfully act so as to conform to B's order. Because A could not in fact transfer the control of his body to B, B would in fact be forced to rely on A's actual control of his body to carry out B's orders, notwithstanding A's agreement.[35] B's "control" of A's body would, then, be metaphorical rather than actual. The argument here is not that force is "ineffective" in getting slaves or servants to obey the orders of their masters but, rather, that force would be unnecessary if the actual control of servants' bodies could be transferred to the masters.[36]

[34] Arthur Kuflik offers these examples to undercut this type of argument for inalienability; "The Inalienability of Autonomy," p. 281 ("This suggests that the impropriety of an autonomy-abdicating agreement has more to do with the impropriety of autonomy-abdication itself than with some general fact that we have no right to make commitments we know we will be unable to keep."). But arguments based on impropriety and one based on the impossibility of such agreements are not mutually exclusive. Kuflik's examples only show that this reason for inalienability is *limited* to those commitments to alienate the future control over one's person which are not made possible by mind-altering drugs, brainwashing techniques, or psychosurgery.

[35] Similarly, a promise to undergo a dependency-inducing procedure would be an unenforceable attempt to transfer an inalienable right: the right to control whether or not to submit to the operation. But third parties might have no right to forcibly interfere with someone who voluntarily undergoes such a procedure. (The claim, for example, that members of religious "cults" may rightfully be kidnapped and "deprogramed" is properly controversial.) A person who voluntarily submitted to such a procedure (assuming that such a procedure actually worked) might be committing a nonfatal kind of "suicide" (zombicide?) and the "master" or guardian *would* then become legally responsible for his ward.

[36] It may be revealing that the law governing employment relations used to be called the law of "master-servant."

This distinction between alienable and inalienable, transferable and non-transferable rights corresponds to the distinction recognized in civil law countries between contracts "to give" and contracts "to do."[37] The former transfer a right to control external resources. The latter call for some future act involving the use of one's person. Surely, the former kind of transfer is possible. What is *my* house or car could equally well be *your* house and car. But bodies are different from other kinds of things. What is *my* body cannot in any literal sense be made *your* body. Because there is no obstacle to transferring control of a house or car (of the sort that is unavoidably presented when one attempts to transfer control over one's body), there is no obstacle to transferring the right to control a house or car.[38] But if control cannot be transferred, then it is hard to see how a right to control can be transferred.[39]

Suppose, now, that the agreement between A and B were recast to read that A transfers to B "the right to use force against A to compel A to conform his conduct to B's commands." It would appear that since force *can* be used by another, the right to use force can be transferred to another and this agreement is not barred by reason of impossibility (though it might be subject to other difficulties). Upon closer inspection, however, such an

[37] See Barry Nicholas, *French Law of Contract* (London: Butterworth & Co., 1982), p. 149 (the French Code "adopts the traditional classification into (a) *donner*, (b) *faire ou ne pas faire*. It is important to note that *donner* in the technical legal sense means neither to make a gift nor to deliver (*livrer*), but to convey, to pass ownership or some other real right."); Guenter H. Treitel, "Remedies for Breach of Contract," Arthur von Mehren, ed., *International Encyclopedia of Comparative Law* (Paris: J. C. B. Mohr, 1976), vol. 7, p. 13 (in French law, the "obligation to do or not to do is contrasted . . . with the *obligation de donner* or to transfer property").

[38] Transferring ownership in animals may be seen as presenting a special difficulty. Cannot animals refuse the orders of the new master? But the problem of control here is less than meets the eye. The second owner gets no more control and hence no more rights than those held by the original owner. Suppose the promisor attempted to transfer the right to a horse that would cuddle up with you in bed. Unless the first owner actually possessed such a horse, the *right to this kind* of horse could not pass. While the failure to tender this kind of horse would not alone constitute a breach of contract, the possibility of an action for fraud or breach of warranty remains. In contrast, the issue of inalienable human rights concerns the rights an individual *retains* despite the fact that consent to transfer these rights may have been expressed. Therefore, the truly analogous problem with animals is whether or not sentient animals themselves have rights — inalienable or otherwise — in the first place, an issue that is well beyond the scope of this essay.

[39] It will not do to argue that such a right to control is transferable because a putative master can obtain legal enforcement of the agreement. Such a claim would be a *non sequitur* in an entitlement theory. According to entitlements theories, we do not have rights because our claims are in fact enforced — the view of legal positivism — but, rather, our claims ought to be enforced only because we can demonstrate that we have rights. Nor would a claim for *damages* for breach of a contract to perform services in the future necessarily entail that a right to the services themselves had been alienated. Rather, as will be discussed below, such a claim could be as well accounted for by saying that it is the right *to the money* — an indisputably alienable right — that had been transferred (conditioned on the nonperformance of the services).

agreement does not escape the problem of attempting to transfer a right of control which cannot in fact be transferred.

If B has the right to use force against A, then A may not rightfully resist. But B has the right to use force against A only if such force can be justified. Such force may be justified if A consented or appeared to consent (and did not change his mind) – for example, if A and B were prize fighters or stunt men, or if A was a masochist. The crucial question, however, is not whether A's consent to the use of force by B justifies B's actions, but whether A's prior consent can limit his right to withhold consent in the future.

Suppose that, after promising to perform services and granting to B the "right" to use force to compel performance, A thinks better of it and revokes his consent. When B (or a court) attempts to enforce B's command, may A rightfully resist? The agreement that B may rightfully use force against A entails that A no longer has a right to resist B because this right has somehow been transferred to B (or lost).[40] Yet A's agreement notwithstanding, A retains his ability to resist B. Just as A cannot alienate his right to the future control of his person because his ability to control his person cannot literally be transferred, A cannot have transferred or lost his right to resist when he retains his ability to resist.[41] Therefore, if A may rightfully resist B, then B may not have the right to use force against A, since such a right would also impose on A a contradictory duty to refrain from resisting.

The implications of this analysis may appear far-reaching.[42] The legitimacy of *all* commitments to perform personal services in the future has been undercut. When a promisor who has promised to perform services in the future refuses to perform, because no right to performance has been transferred to the promisee by the promise, no right of the promisee is violated by nonperformance. But, as will be considered below, the actual consequence

[40] If A retains his right to resist B, then A will be acting both rightfully and wrongfully should he resist B. Such a conflict of rights is barred by the compossibility feature of an entitlements theory. See *supra* note 32 and accompanying text.

[41] True, as above, A can voluntarily submit to procedures which would eliminate his ability to resist (although it is very hard to imagine the value to a master of a slave who had lost the power to physically resist violence). The harder question would then be, in the unlikely event that A's ability to resist had been alienated, can others rightfully go to A's defense? This issue would perhaps be best governed by principles of guardianship. See Kuflik, "The Inalienability of Autonomy," p. 275 ("[T]o say that autonomy cannot be alienated is not to deny that one human being can be legitimately subject to the guardianship of another."); Barnett, "Pursuing Justice," p. 69, note 17 (briefly discussing the concept of guardianship in a Liberty Approach).

[42] But the analysis just presented is not as far-reaching as some might at first imagine. It neither stems from nor supports a view that the only rights we have are those which we are able to assert — that "might makes right." The analysis of inalienability in the text claims only to describe a feature of those rights which we (arguably) have: some of these rights may be alienated or transferred, others of them may not. What rights we have and how we come to have them is another story requiring additional analysis. See Barnett, "Pursuing Justice." I thank Emilio Pacheco for bringing this issue to my attention.

of such an analysis is only to limit relief for nonperformance of personal service commitments to money damages.

Suppose, now, that A attempts to transfer a right to control *parts* of his body to B – such as his blood or heart. Since a transfer of actual control of these body parts is possible, the transfer of a right to control is also possible. Accordingly, agreements to transfer body parts may not be barred by the second reason for inalienability. Some such agreements, however, may be barred by a third reason for inalienable rights.

Rights may not only arise from duties one has to respect the rights of others; they may also arise from duties owed to oneself. Suppose that it could be shown that one has a moral duty to live a good life or to pursue happiness. Such a duty may imply that it would be wrong for others to interfere with such actions, which would mean that we would have rights to be free from such interference.[43] Would not such a claim also imply that some of these rights may not be transferred to another by consent? For example, the rights we have to acquire and then use resources in the world are essential to carrying out such duties to oneself and for this reason would be inalienable. Therefore, an agreement to transfer rights to all present and future acquired external possessions would be an unenforceable attempt to transfer an inalienable right.[44]

Further, a person's consensual commitment to always obey all the commands of another (or all those commands which are lawful) might be unenforceable because it is never the case that such a commitment is conducive to the pursuit of a good life. This would be true if the good life is a "do-it-youself job";[45] i.e., even if one is doing "all the right things," one's life is truly impoverished if one is not freely choosing to do the right things. If this is true, one may never alienate the right to make all choices about one's actions – that is, slavery – because doing so will always be an inferior moral choice.[46]

According to this analysis, while one may freely and rightfully continue to obey the commands of another, what one never loses – no matter what one has consented to – is the right to change one's mind and begin pursuing the truly moral course of self-directed action. Suppose that a competent, adult

[43] Henry B. Veatch offers an account of rights based on self-regarding duties in *Human Rights: Fact or Fancy* (Baton Rouge: Louisiana State Univ. Press, 1985).

[44] Such a principle would provide a property rights basis for some limited form of "bankruptcy" laws. See Lawrence H. White, "Bankruptcy as an Economic Intervention," *Journal of Libertarian Studies*, vol. 1 (1977), p. 287, note 27 ("Perhaps some distinction among the debtor's assets in terms of alienability can be made according to a standard of subsistence . . . .").

[45] Veatch, *Human Rights*, p. 114.

[46] See John Stuart Mill, *On Liberty* (Indianapolis: Library of Liberal Arts, 1956), p. 125 (A person, "by selling himself for a slave . . . defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself.").

person commits herself to giving her heart to a dearly loved one, an action which – unlike the gift of blood – will inevitably result in her death, and that no fraud or duress is used to induce this consent. We might conclude that while the person has no duty to make such a gift – such an act would be termed supererogatory – and, indeed, the gift might be in conflict with the duty that person owes to herself (of course, it also might not), no *other* person would have the right to interavene and prevent such a sacrifice from being made.

Suppose, now, that after the commitment has been made, the person making it changes her mind and refuses to go through with the transfer. While a person may be able to transfer control over a heart to another (and arguably may not be prevented from doing so), her never-ending duty to herself prevents her from transferring a right to her heart to another such that she must convey control of the heart even if she changes her mind. The same reasoning applies with equal force to attempts to alienate a right to the future control of the rest of one's body, since doing so is always inconsistent with the duty that one owes to oneself. In fact, the most salient characteristic of inalienable rights may be that, while rights-holders may *exercise* their inalienable rights for the benefit of others, a rights-holder may never surrender *the right to change her mind* about whether to exercise such rights or not.[47]

Anthony Kronman has argued that legal prohibitions of slavery are "paternalist."[48] But while an argument for inalienable rights might be paternalist, this need not be so. Surely the account just provided is not paternalist.[49] No

[47] Cf. *ibid.*, p. 125 ("[T]here are perhaps no contracts or engagements, except those that relate to money or money's worth, of which one can venture to say that there ought to be no liberty whatsoever of retraction."). Extreme situations warranting different treatment can always be hypothesized. For example, may a pilot be forcibly compelled to complete a journey he has contracted to fly and be prevented from parachuting out of a plane? The endangerment involved in the example, however, introduces a tortious element. The better analogy would be to ask whether a pilot who safely lands a plane short of completing a designated route can be compelled to finish the trip.

[48] See Anthony Kronman, "Paternalism and the Law of Contracts," *Yale Law Journal*, vol. 92 (1983), pp. 774–776 (attempting to show that paternalist restrictions in contract law are well-accepted and permissible).

[49] An argument for inalienable rights is not paternalist simply because advocates of such rights argue that restrictions on (everyone's) options are, on balance, best (for everyone). First, such a universal argument for inalienable rights denies everyone the same option and therefore does not put advocates into any type of parental stance towards others. Second, *all* rights — not just inalienable ones — can be advocated on the grounds that individuals be permitted the liberty that rights provide because such liberty is "good" for them. See Barnett, "Pursuing Justice," pp. 50–72. And any compossible system of rights restricts somebody's options — one may not act so as to violate the rights of another. If it is not paternalist to advocate these restraints on the ground that they are good or necessary for rights-holders and nonrights-holders alike, then it is not paternalistic to argue in the same manner for restrictions on the alienability of certain of these rights.

one may rightfully interfere in the consensual sacrificial conduct of a competent adult – as a parent may interfere with a child – simply because the intermeddler knows what is truly best for the individual making the sacrifice. Rather, this argument against the enforceability of agreements to transfer control over one's body is that the law should not specifically enforce certain commitments when the party who made the original commitment thinks better of it.[50]

An inalienable right does not give others the right to think for a competent adult. Such rights simply define a category of decisions about which competent adults may rightfully override *their own* previously expressed preferences. Where *ex ante* consent and *ex post* consent are the same, there would be no breach of contract. Restrictions on alienability, then, are really rules concerning which of two inconsistent expressions of assent by the same party determines the rights of both parties to an agreement: With alienable rights, *ex ante* consent transfers rights to control resources and binds the transferor *ex post*. With inalienable rights, a right to control resources is never transferred by consent, so *ex post* consent takes precedence over *ex ante* consent.

A fourth reason why some rights may be inalienable stems from a general skepticism that agreements to transfer rights amounting to the control of one's destiny would ever (or very often) be obtained in the absence of incompetence, fraud, duress, mistake, or some other recognized contract defense. Assuming that it was theoretically possible to alienate every right (including a right to the future control of one's person), the failure of any legal system to accurately decide every case, coupled with the extremely high cost of error in evaluating the procedural validity of certain rights-transfer agreements, argues for a blanket prohibition on the transfer of certain kinds of rights.[51] For example, the high cost of erroneously deciding that a slavery contract was truly voluntary could be said to militate against *ever* permitting the enforcement of such an agreement.

The argument that epistemological uncertainty and the cost of epistemic errors might convert rights that are in point of moral principle alienable into

[50] In assessing a different argument for inalienability than that presented here, Calabresi and Melamed, "Property Rules," p. 1113, make a similar observation:

> This type of limitation is not in any real sense paternalism. . . . It merely allows the individual to choose what is best in the long run rather than in the short run, even though that choice entails giving up some short run freedom of choice.

[51] See Kronman, "Paternalism," p. 768 ("[I]f fraud is widespread, if it can be concealed with sufficient ease, and if the victims of the fraud typically lack the resources to prosecute their legal claims, lowering the proof requirement may not be enough. A more radical solution . . . is to give the victims an inalienable entitlement they cannot waive and therefore cannot be fraudulently induced to abandon."); McConnell, "The Nature and Basis," pp. 53–54 ("[T]he policy in question is one that could easily be abused, thereby resulting in harm to nonconsenting parties.").

rights that are legally inalienable is an example of indirect consequentialism.[52] Such system concerns can prove to be quite compelling in any serious effort to formulate a legal system that is truly just in its actual operation.[53]

3. *What Rights Are Inalienable?* We cannot conclude on the basis of the four reasons presented here for inalienable rights that *all* our rights are inalienable. Far from it. The transfer of rights to control external resources is both possible and normally compatible with the duties we owe ourselves and others.[54] Nor could it be fairly argued that the cost of erroneous adjudication of claims to external resources always "exceeds" the benefits of permitting alienation. Except in the most rare and extreme of circumstances,[55] rights to external resources are not inalienable.[56]

On the other hand, the alienability of rights wholly or partially to control the future use of one's person has been called into question. The transfer of the right totally to control one's person may conflict with the duties one has to respect the rights of others. Even if slavery agreements are limited to obeying only those commands which respect the rights of others, the costs of an erroneous decision to enforce such an agreement may create epistemic risks so great that in every case they are deemed to outweigh whatever benefits might accrue from enforcement. Further, the transfer of complete or partial rights of control might inevitably conflict with duties one owes to oneself. Moreover, the transfer of even limited rights of bodily control may

[52] See Larry Alexander, "Pursuing the Good — Indirectly," *Ethics*, vol. 95 (1985), pp. 315–332; John Gray, "Indirect Utility and Fundamental Rights," *Social Philosophy & Policy*, vol. 1 (Spring 1984), pp. 73–91.

[53] Richard Epstein has stressed the importance of epistemic problems of administration for the formulation of common law rules. See, e.g., Richard Epstein, "Unconscionability," pp. 300–303; "The Social Consequences of Common Law Rules," *Harvard Law Review*, vol. 95 (1982), pp. 1748–1749. See also Sher, "Rights Violations."

[54] For example, we transfer rights to some things in exchange for rights to other things we value more highly; and we make gifts because the good life entails acting charitably towards others. See Richard A. Epstein, "Why Restrain Alienation," *Columbia Law Review*, vol. 85 (1985), pp. 971–972 (discussing reasons why alienation is permitted).

[55] As was suggested above (*supra* note 44 and accompanying text) attempts to alienate rights to such a quantity of external resources that there would not be enough left for the transferor to survive are not enforceable. In other words, at some minimum quantity, normally alienable rights to external resources become inalienable.

[56] Other reasons for inalienability of otherwise alienable external property have been suggested, but space constraints prevent me from considering them here. See, e.g., Susan Rose-Ackerman, "Inalienability and the Theory of Property Rights," *Columbia Law Review*, vol. 85 (1985), pp. 931–969; Epstein, "Why Restrain Alienation," pp. 973–990.

be barred in principle by the literal impossibility of transferring control over one's person.

Thus, we may conclude that (a) rights to possess, use, and control resources external to one's person are (generally) alienable, and (b) the right to possess, use, and control one's person is inalienable.

V. REFORMING THE RULES GOVERNING CONTRACT REMEDIES

A consent theory of contract permits us to distinguish between the *subject* of a contract – that is, the particular rights being transferred from one party to the other – and the *object* of a contract – that is, what the parties are trying to accomplish by entering into a contractual arrangement. Only alienable rights may be the subject of an enforceable rights-transfer agreement. Obstacles in the path of a presumption favoring specific performance of all contracts may be obviated by distinguishing three kinds of contracts: contracts for external resources, contracts for personal services, and contracts for corporate services.[57]

In this section, the problems traditionally associated with specifically enforcing contracts for personal services will be shown to stem from the fact that inalienable rights may improperly be construed as the subject, rather than the object, of such contracts. In contrast, the specific performance of contracts for corporate services gives rise to no such problem.

1. *Contracts for External Resources.* The first kind of contract involves consent to transfer alienable rights to possess, control, and use identifiable external resources, whether land or goods. Because rights to external resources are presumptively alienable, such rights may be made the subject of an enforceable rights transfer.

If *A* contracts to "sell" a piece of land or some good like a car to *B*, most people would expect that when the contract is executed *B* has a right to the specified land or car. Therefore, when this is the normal expectation and intention, the normal or presumptive remedy for breach of contract in such a case should be that *B*'s newly acquired rights to the land or car are respected

[57] This essay does not exhaust the subject of inalienable rights, nor that of the proper choice of contract remedies. Contracts to provide employment, for example, do not easily fit into any of the three categories of contracts discussed in this paper. Determining whether such a contract may permissibly be specifically enforced might turn out to require a more extended discussion of inalienable rights.

– he gets the land or car if he still desires to receive it.[58] If not, he may elect to receive money damages.[59]

> Why not, as in both French and German law, give specific performance as to any physical object that can be found and is reachable by direct execution? It is true that wherever speed is a factor and markets reasonably organized, promisees will not often ask for it, as has proved true in Germany (and I think also in France). But why not leave this to the promisee's choice?[60]

Of course, *A* and *B* need not agree to transfer the right to the land or car itself. They might instead include an express provision in their original contract that would rebut the normal meaning of such contracts and limit recovery for breach to money damages. The *object* of such a contract might be to secure performance, but its *subject* would be a conditional transfer of a right to compensation for nonperformance. A consent theory of contract says that such an agreement would ordinarily be enforced.[61]

[58] This category corresponds to the category of contracts to give (*donner*) in French law; see *supra* note 37 and accompanying text. Consistent with the analysis in the text, French law grants specific performance as a matter of right. See B. Nicholas, *French Law*, p. 211; Treitel, "Remedies," p. 13.

[59] It is arguable that, in some cases, sellers might be permitted to show why buyers should not get the thing contracted for. For example, if a fungible replacement good is easily available to the buyer on the market, but performance would be an extreme hardship on the seller, then where the contract is silent on the form of relief, the seller might be liable only for money damages. Where these circumstances can be shown to exist, and in the absence of an express clause, it may no longer be safe to presume that sellers would have consented to specific relief. In contrast with the traditional rule, however, the burden of proof is placed on the appropriate party — the party in breach. But see Schwartz, "The Case for Specific Performance," p. 289, note 52 (arguing against the recognition of such a defense on the grounds that it is unnecessary in practice, costly to administer, and unpredictable in application). Nonetheless, Schwartz does favor a very limited defense to specific performance based on administrative difficulty: "Although such cases are rare, courts should have the power to deny specific performance where necessary." *ibid.*, p. 305.

[60] John Dawson, "Specific Performance in France and Germany," *Michigan Law Review*, vol. 57 (1959), p. 532. The common law apparently once granted a comparable right of replevin to buyers of goods, but this right was conceived of as arising from property law, not contract law; see Friedrich Kessler and Grant Gilmore, *Contracts: Cases and Materials*, 2d ed. (Boston, MA: Little, Brown & Co., 1970), p. 1000 (describing this "twin set of remedies" as "one of the curiosities of sales law as it developed in the nineteenth century").

[61] While courts are generally willing to enforce limitation of damages provisions, at present they do not generally recognize the parties' right to expressly agree to a specific performance remedy in their contract. See Ian R. Macneil, "Power of Contract and Agreed Remedies," *Cornell Law Quarterly*, vol 47 (1962), pp. 495–528 (describing the various limitations on the enforcement of agreed remedies); Anthony Kronman, "Specific Performance," pp. 369–376 (describing present law and favoring the enforcement of such clauses). Perhaps courts would be more respectful of such clauses, if it became clearer why a specific performance clause in a contract for personal services would not be enforceable.

2. Contracts for Personal Services. What should happen if *A* breaches a commitment to provide personal services by refusing to perform as agreed? Can a commitment by *A* to *B* that *A* will do something for *B* constitute a valid contract? If the right to the future control of one's person is inalienable, the personal services in question cannot be the subject of a valid rights transfer agreement. Therefore, if a promise to provide personal services is only a commitment to exercise inalienable rights, then it is unenforceable. By breaching his promise to *B*, *A* may commit a morally bad act. He has not, however, committed a legally cognizable wrong.

Alternatively, a contract "to provide personal services" might accurately be construed as a commitment to transfer alienable rights to money damages (or other alienable resources) on the condition that specified personal services are not performed as promised. Such an agreement would not purport to transfer the inalienable right to the services themselves. Rather, such an agreement would (conditionally) transfer alienable rights to the money and would be enforceable in the event that the condition was satisfied – that is, in the event that services were not performed as agreed. In essence, the true commitment in an enforceable agreement to provide personal services would be: "I'll do *X* for you and, if I fail to perform *X*, you will have the right to money damages."[62]

While the *object* or purpose of such a contract for personal services would be to assure that one party will exercise his inalienable rights in a certain way some time in the future, the actual *subject* of such a contract would be the transfer of alienable rights to the money.

> Every obligation to do or not to do (*de faire ou de ne pas faire*) resolves itself into damages in the case of non-performance by the debtor.[63]

Thus, if *A* consents to a legally binding commitment to personally paint *B*'s picture, then no matter what the contract specifies, *B*'s only right is to money

[62] Justice O. W. Holmes, Jr., suggested this approach as a general rule of contract remedies in *The Common Law* (Boston: Little, Brown & Co., 1881), p. 301:

> The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass.

While this passage is both famous and often criticized, it has been noted that Holmes did not assert that money damages were the exclusive form relief for all breaches, only that it was the only remedy that was always or generally available. See Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Proving Years* (Cambridge, MA: Harvard Univ. Press, 1963), pp. 233–237.

[63] French Civil Code, art. 1142 as it appears in Nicholas, *French Law*, p. 210. Of course, any such award would be limited by the quantitative constraints placed on the alienation of external resources discussed *supra* note 44.

damages (specific enforcement of the transfer of the money)[64] – even if *A*'s performance is unique or monetary damages are inadequate for some other reason. When viewed in this manner, contracts for personal services require no exception to a remedies rule which generally favors specific performance. It is the stipulated transfer of money that will be specifically enforced in the event of a failure to perform.

Limiting the proper subject of contracts for personal services to money damages (which will be specifically enforced) produces legal results which are entirely consonant with the common law's traditional reluctance to grant specific relief for breach of personal services contracts. A consent theory of contract and a proper distinction between alienable and inalienable rights both explains and justifies this seemingly *ad hoc* "public policy" exception.

3. *Contracts for Corporate Services.* At first blush, it may appear that if Firm *A* legally commits itself to provide corporate services involving individual labor to a consumer or another firm, such a contract should be governed by the same rule that applies to contracts for personal services. But there is an important difference. If Firm *A* breaches its contract to provide services, it need not be the case and, in fact, it is quite unlikely that the reason for the breach is the unwillingness of the employees of the firm who are personally to provide the services. Rather, what has likely happened is that for one reason or another, the owners or managers of Firm *A* have found it inexpedient to honor their commitment. They might, for example, have found a more profitable opportunity elsewhere, or something may have occurred to make performance more costly to them than they had anticipated.

If the undesirablity of performance to the owners or management of a firm and not the reluctance of the workers supplying their labor accounts for the decision to breach, a court may still be faced with problems of administering a decree of specific performance. It will not, however, confront the issue of involuntary servitude that plagues the specific performance of personal services contracts.

> The liberty interest objection thus poses no barrier to expanding the availability of specific performance to sales of roughly fungible goods and corporate services.[65]

[64] What the contract specifies might influence which *measure* of money damages is used. For an explanation of the various possible measures of contract damages, see Robert Cooter and Melvin Aron Eisenberg, "Damages for Breach of Contract," *California Law Review*, vol. 73 (1985), pp. 1432–1465; Lon L. Fuller and William R. Perdue, Jr., "The Reliance Interest in Contract Damages," *Yale Law Journal*, vol. 46 (1936), pp. 52–96.

[65] Schwartz, "The Case for Specific Performance," p. 298.

True, as with personal service contracts, the services of the employees cannot be the subject of a valid contract because such services consist of the employees' exercise of their inalienable rights. And if an employee breaches his contract to perform services for the firm, he would only be liable to the firm for money damages. Unlike contracts for personal services, however, the subject of a valid contract for corporate services need not be limited to the payment of money damages for failure to perform as agreed. The following series of examples illustrates that another morally permissible construction exists as well.

First, suppose that *A* wishes to have his house painted and is unable or unwilling to paint it himself. *A* can contract with individual *B* that *B* will paint the house – that is, *B* commits herself to compensate *A* if she fails to paint the house. If *B* breaches this contract to provide personal services, she is liable only for money damages. Suppose, instead, that *A* decides to buy Firm *C* which is a housepainting company. As the owner of Firm *C*, *A* may then order its painters to paint his house. (If any painter refuses to do so, then that painter may have breached whatever employment contract she has with Firm *C* and, if so, she is liable to the firm for money damages.) This may mean that Firm *C* might have to pass up the opportunity to contract with individual *D* to paint *D*'s house. As the new owner of the company, the right to make this decision now belongs to *A*.

Now, suppose *A* thinks that it is both too much trouble and too expensive to buy a painting company merely because he wishes to have his house painted. The only right of ownership that *A* really wants is the right to order the employees of Firm *C* to paint his house. To secure this and only this right, instead of buying Firm *C*, *A* contracts with it to paint his house. The principal difference between the two transactions is that a direct purchase of Firm *C* gives *A* many more rights in addition to the right to direct the firm's painters to paint his house – rights which he neither desires, nor can afford to purchase. A contract for corporate services, on the other hand, may transfer only the narrow right to direct the employees to paint his house, which *A* desires, and nothing more.

A court order that Firm *C*'s employees paint *B*'s house is no different from *A* issuing this order as the owner of the firm. While one person cannot own another person, a person can own a firm. This suggests that where *A* contracts to buy corporate services from Firm *C*, *A* might have acquired a (very limited) kind of ownership right to the resources *of the firm*.[66]

[66] Cf. Steven N. S. Cheung, "The Structure of a Contract and the Theory of a Non-Exclusive Resource," *Journal of Law and Economics*, vol. 13 (1970), p. 50 ("Combining resources of several owners for production involves partial or outright transfers of property rights through a contract.").

Whether *A* has in fact acquired such a right depends entirely on the construction given the terms of the contract. A consent theory would look first to the demonstrated intentions of the parties or, if the contract is silent on this issue, to the custom of trade. (If there is no trade custom, the problem of interpreting the contract becomes more complicated.) The agreement itself or the trade custom might have only given *A* a right to money damages for breach; or it might instead have specified that *A* gets the same right to have Firm *C*'s employees directed to paint his house that he would have acquired by buying the company and becoming its owner. No matter which form of relief the parties agree to, however, there is no moral problem of the sort that exists with specifically enforcing personal services contracts.

Suppose, now, that the contract is silent on the issue and no trade custom exists. An important reason exists for favoring specific performance of a contract for corporate services, provided that the victim of the breach is an individual (as opposed to another firm). Purchasers who are legally unsophisticated – that is, unfamiliar with the common law rules governing the choice of remedy – most likely assume when they contract for performance from the firm that performance is what they can get if there is a breach, because performance is what they bargained for. If the legal rule governing the choice of remedies awarded only money damages, then such persons – who are by assumption ignorant of the legal background – would be most unlikely to insist on an expressed clause to the contrary. Their silence would not, then, reliably indicate assent to the terms provided by the legal background rule. By interpreting this silence as assent, courts would likely be giving firms a beneficial term they had not paid for.

In contrast, a firm in the business of regularly providing corporate services is, by virtue of its past experience (or legal counsel), very likely to be aware of the prevailing background legal rule and, should it not wish to be bound by this rule, it can be expected to try to insert in the contract an expressed provision to the contrary – that is, a term that mandates money damages only. This suggests that when a contract to provide corporate services which is silent on the issue of remedy is breached by the service provider,[67] and the victim is an individual (not another firm), a court should, at the request of the victim of the breach, order specific performance.[68] In short, where the

[67] The provider of "corporate services" is by definition a firm. When the service provider is an individual, rather than a firm, this is a contract for *personal* services for which only money damages for breach of contract should be obtained.

[68] Service providers might arguably be permitted to oppose a request for specific performance by showing that the services they provide are readily available elsewhere and performance is for some reason an extreme hardship. But, as with contracts for external resources, the recognition of such a defense would be controversial. See *supra* note 59.

purchaser of corporate services is an individual consumer, the reverse of the traditional rule governing contract damages should apply and specific performance should be favored.[69]

Providers of corporate services who wish to limit their liability to monetary damages would have to attempt to insert a clause to this effect in the contract. A presumption of specific performance when the recipient of corporate services is an individual forces the party with better access to the background rule (the firm) to educate the less knowledgeable party by its bargaining behaviour.[70]

VI. SUMMARY

The traditional approach to remedies for breach of contract is that only money damages are available to the victim as of right. Specific performance is an exceptional form of relief available only when money damages are inadequate. Even when damages are inadequate, however, a contract for personal services will not be specifically enforced. A consent theory of contract suggests the following rule to govern the choice of remedies for breach of contract: The only enforceable agreements are those which consensually transfer alienable rights. All such agreements should presumptively be specifically enforced.

Where a contract transfers the right to *external resources*, then transfer of these resources should be ordered by a court. If parties do not wish this result, they may agree – or trade custom might establish – that only monetary damages will be due for failure to deliver a promised resource.

[69] It may well be that the best rule for corporate services contracts when both parties are firms is the traditional one: the victim of the breach has a right to money damages, but may obtain specific performance if it can show that damages are inadequate. Assuming that money damage awards are less costly to administer and comply with, the traditional rule might best reflect the intentions of the parties when (a) the parties and trade custom are silent on the issue of remedies, and (b) both parties are firms and therefore are presumably aware of the background legal rule. Kronman and Schwartz sharply disagree with each other about what, if any, general inference of the parties' intentions can be derived from an analysis of their *ex ante* interests. Compare Kronman, "Specific Performance," pp. 365–369 ("There is . . . some basis for believing the uniqueness test reflects the typical solution that contracting parties would arrange for themselves in light of their *ex ante* interests."), with Schwartz, "The Case for Specific Performance," pp. 279–284 (criticizing Kronman's analysis and rejecting his conclusion). The incentive effects of the legal rule are less significant here than when the recipient of corporate services is an individual, because both parties are sophisticated enough to bargain for a clause which deviates from the legal background if they wish a different remedy. This assumes, however, that such a clause will be enforced, which may not be true at present. See *supra* note 61.

[70] Even an express clause in a form contract can serve to give the recipient of services notice of the remedy in the event of a breach: see Douglas G. Baird and Robert Weisberg, "Rules, Standards, and the Battle of the Forms: A Reassessment of §2–207," *Virginia Law Review*, vol. 68 (1982), pp. 1217–1262 (discussing the value of form contracts and ways to resolve disputes when the forms used by contracting parties conflict).

Since a right to *personal services* is inalienable, persons wishing to enhance the reliability of a promise to perform personal services by means of a contract may accomplish this object by making a transfer of alienable rights (to money or other property) conditional on nonperformance. Upon failure to perform the desired services, the rights transfer could be specifically enforced.

Where a contract calls for the provision of *corporate services*, the subject of the contract may either be a right to money damages or a limited right to control the firm. Since both of these rights are potentially alienable, when either right is transferred, a court may order a firm to specifically perform. Where the purchaser of corporate services is an individual, a court should (at least) presumptively award specific performance.

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PRACTICAL WISDOM AND PROFESSIONAL CHARACTER

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I

The existence of the legal profession is something most lawyers take for granted. Lawyers of course do many different things, and lead different sorts of lives, but those who make their living in the law tend to assume, without much reflection, that they have a bond or association of some sort with others who do the same and believe they share something important in common with them. It is not at all clear, however, what this common element is, and the great diversity of tasks that lawyers perform – representing litigants, counseling clients, advising legislators, administering government programs, and deciding cases – can easily make one doubt whether the search for a link leads to anything but empty generalities.

One may, of course, conclude that the main law jobs, as Karl Llewellyn called them,[1] have nothing important in common, and that the legal profession is only a name for a disconnected collection of pursuits with no substance or reality of its own. This is not, however, a very satisfying view, to lawyers at least, and is likely to provoke the quick reply that what lawyers share in common is after all quite easy to discern. All lawyers, regardless of the nature of their work, possess a general knowledge of the law which they have acquired through a specialized program of instruction; laypersons lack such knowledge and it is this, one might argue, which marks the line between those who are lawyers and those who are not and, thus, defines the scope and nature of the profession.

This view, however, also denies the existence of the legal profession, though in a less obvious way. Undoubtedly, to be a lawyer one must possess a special knowledge of the law, just as one must possess a special knowledge of automobiles to be a mechanic. But lawyers resist the idea that they are mere technicians, and nothing disturbs a legal educator as much as the suggestion that he is running a trade school operation. This reaction reflects the belief

* I would like to thank my colleague Perry Dane for his very helpful comments on an earlier draft.

[1] K. Llewellyn, *The Normative, The Legal and the Law Jobs: The Job of Juristic Method*, 49 Yale L. J. 1355 (1940).