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# THE HOLMESIAN BAD MAN'S FIRST CRITIC

Douglas G. Baird\*

Richard Epstein's work emanates from an unshakeable conviction that a coherent account of the law must be derived from first principles. Simply cataloguing rules or making vague generalizations is not the same thing as having a theory. As Lord Kelvin reminded us, there are only two kinds of science, physics and stamp collecting.<sup>1</sup> Richard Epstein is many things, but he is no stamp collector. It is in this spirit that I want to revisit Holmes's *Path of the Law*.

In the winter of 1897, Oliver Wendell Holmes Jr. was fifty-five and languishing as an associate justice on a state supreme court.<sup>2</sup> He seemed destined to remain forever in the shadow of his father, the well-known man of letters who had died only a few years before. He was invited to give a talk at Boston University and, having little to lose, he chose to be provocative. He told this group of law students and young lawyers that “[i]f you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”<sup>3</sup>

What are we to make of this observation? Many have taken Holmes to task for this bloodless and detached view of the law. Even before *The Path of the Law*, a novelist had savaged Holmes on this account. Only thinly disguised, Holmes appears as someone called “The Young Astronomer.”<sup>4</sup> This character is mocked for devoting all his time to observing the heavens, separating himself from all human interaction. Holmes (as fictionalized) was someone given “to looking at life as at a solemn show where he is only a spectator.”<sup>5</sup> Of course, you are not cold, distant, and unfeeling merely because some writer paints you this way, but when the writer in question is your own father, you might wonder if there isn't something to it.

And remoteness and an absence of moral understanding do seem recipes for bad judging. Judges should not be distant spectators. When they are, they are wont to err and

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1. Stamps: Webster's Quotations, Facts and Phrases 1 (ICON Group Intl. 2008).

2. For an excellent account of the events leading to the writing of *The Path of the Law*, see David J. Seipp, *Holmes's Path*, 77 B.U. L. Rev. 515 (1997).

3. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897).

4. See Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Proving Years 1870-1882* vol. 2, 5-8 (1963).

5. *Id.* at 7.

display a heartlessness incompatible with notions of fundamental justice.<sup>6</sup> Such individuals are all too likely to conclude that “three generations of imbeciles are enough.”<sup>7</sup>

The link most believe exists between law and morals has led most to be equally critical of what comes next in *The Path of the Law*—the observation that “[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it . . . .”<sup>8</sup> Here again, something important seems to be missing. Few think themselves free to break a promise and write a check instead. The existence of a legal obligation is a reason to perform that act, independent of the likelihood of a legal sanction. Most people think that when they make a promise, they should keep it, independent of the legal consequences attached to it. Breaking a promise and then paying damages is not the same as keeping a promise in the first place.

In this essay, I want to suggest that the focus on Holmes’s bad man and the law of contracts is misplaced. It distracts us from what Holmes was about.<sup>9</sup> Without loss of generality, one could substitute “scientist” for “bad man.” Holmes viewed the enterprise of the legal scholar as one of trying to identify the principles that describe the outcome of decided cases. To do this, one needed to look at decided cases just as astronomers looked at stars and planets.

But Holmes misunderstood the task confronting someone searching for fundamental principles. To remain with the metaphor of the Young Astronomer, it is not enough to locate the various stars and planets. One must be able to single out the subtle ways in which observations depart from your theory and know whether the difference, regardless of how small it is, matters. The question again is not how much you miss, but how important it is.

To be sure, Holmes’s account of contract law corresponds in the main with the way contracts cases are decided. The typical remedy for a breach of contract is money damages. You catch most of the action when you center your theory of contracts around them, but this is not the right question. We need to know if the small deviations matter. We need to know if a theory of contract so centered on damages misses anything fundamental. Kepler observed the retrograde motion of Mars. It was only a small deviation from what Ptolemy’s and Copernicus’s model predicted, but it showed him that something was fundamentally wrong about all previous accounts.<sup>10</sup>

But let us not get ahead of ourselves. Holmes claimed the law of contracts could

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6. One of the most effective of these attacks on Holmes was the one launched by one of my teachers in law school, Yosai Rogat. For his own views of Holmes as the Young Astronomer, see Yosai Rogat, *The Judge as Spectator*, 31 U. Chi. L. Rev. 213, 243–56 (1964).

7. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

8. Holmes, *supra* n. 3, at 462.

9. Holmes tried to explain this distinction in two letters to Pollock. He emphasized that his focus was upon the way in which a discrete act triggered the legal obligation, not that the person was promising either to perform or pay damages. See *The Pollock–Holmes Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874–1932*, at 177–78, 233–34 (Mark DeWolfe Howe ed. 1942). Others, of course, have made this basic point that Holmes was trying to provide a description of the law rather than denying its moral content. See e.g. Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 Fordham L. Rev. 1085 (2000).

10. They had assumed circular, rather than elliptical, motions of the planets. See Forest Ray Moulton, *An Introduction to Astronomy* 117–20 (MacMillan 1917).

be organized around the idea that someone who entered into a contract was in the same position as someone who had committed a tort.<sup>11</sup> While the tortfeasor, by acting negligently, became bound to pay a particular sum, a promisor, by making a promise, became obliged to pay a particular sum. The only difference was that the promisor could call off the obligation to pay by performing the promised act. There may be more flowery or elaborate or morally laden ways to say it, but in the end this is all you need to say to capture the legal rule and predict what a judge would do in a particular case. And, as among the different ways of saying the same thing, when two theories explain as much, one should prefer the one that requires the fewest assumptions.<sup>12</sup>

A century later, Richard Posner is Holmes's intellectual heir. Like Holmes, Posner sought to reduce the common law to its essential principles. In particular, the basic postulates of microeconomics explain the essential features of the common law. The common law of torts turns on the idea of negligence because a negligence rule ensures that parties have incentives to take care.<sup>13</sup> Similarly, the rule that those who fail to keep promises pay expectation damages forces them to internalize the costs of breach.<sup>14</sup> Giving individuals an "option" to perform or pay damages is economically efficient. Many attacks on Posner were of the sort that Holmes faced over the years. The common law was too wonderful and the law too subtle to be reduced to the axioms of economics. Posner's account of the law was, like Holmes's, too remote, too detached, and too bloodless. But the most sustained and perhaps the most effective attack on Posner came from the young Richard Epstein. It was altogether different. He challenged Posner's account of tort law on the merits. In his view, Posner was wrong to trumpet the virtues of negligence because it was fundamentally not what the common law of tort was about. Strict liability was the animating principle of tort law, and it was best explained not by economics, but a deep commitment to individual liberty, limited by prescriptions on the use of force and fraud.<sup>15</sup> The problem with Posner, in other words, was not that he was bloodless, remote, and detached, but rather that his account of the law was wanting.

In the century that has passed since *The Path of the Law*, we have largely failed to take Holmes on his own terms as Epstein took on Posner. But it was not always this way. Indeed, Holmes's "bad man" view of the common law and his effort to capture contractual liability as option to perform or pay damages grew out of a debate he was having with another legal scholar in an exchange of letters that has largely been forgotten.<sup>16</sup> This scholar made his attack on Holmes in a fashion that recalls the young Epstein and indeed connects with Epstein's own important work on tortious interference with contract.<sup>17</sup> I want to devote this Essay to his critique of Holmes and the light it sheds on contract law generally.

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11. See Holmes, *supra* n. 2, at 462.

12. For a formal exposition of this idea, see Paul R. Thagard, *The Best Explanation: Criteria for Theory Choice*, 75 J. Phil. 76, 87-89 (1978).

13. See Richard A. Posner, *A Theory of Negligence*, 1 J. Leg. Stud. 29 (1972).

14. Richard A. Posner, *Economic Analysis of Law* § 4.8 (5th ed., Aspen Publishers 1997).

15. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Leg. Stud. 151 (1973).

16. The conspicuous exception is Seipp, *supra* n. 2.

17. Richard A. Epstein, *Inducement of Breach of Contract as a Problem of Ostensible Ownership*, 16 J. Leg. Stud. 1 (1987).

## I.

In 1895, Edward Avery Harriman was a young contracts professor teaching at Northwestern. He had just published the opening chapter of his book on contracts, entitled *The Nature of Contractual Obligation*.<sup>18</sup> Harriman sought “a ‘scientific system of jurisprudence . . . .’”<sup>19</sup> This required an analysis and classification of the peculiar features of the Anglo-American system: “The contractual obligations which the common law recognized were enforced and are still enforced not because those obligations are the result of agreement, but because certain forms of procedure afforded remedies for certain wrongs.”<sup>20</sup> Tying contractual obligations was a daunting challenge for someone bent upon giving a coherent account of the law. As Harriman put it, it was “about as satisfactory as a method of classification to the student of jurisprudence as the classification of flowers or rocks by their color would be to the botanist or geologist.”<sup>21</sup>

Harriman, like many young law professors since, sent the paper to a senior scholar whom he especially admired—Justice Holmes. In Holmes, he found a sympathetic ear. Harriman had, after all, enthusiastically adopted Holmes’s objective theory of contract. As Holmes had already set out in *The Common Law* and was to reiterate in *The Path of the Law*, the existence of a legally enforceable contract did not turn on whether there was any subjective meeting of the minds. What matters is what parties say, not what they intend. What interested (and perhaps disconcerted) Holmes the most in Harriman’s essay, however, was the way in which he ended it: “Whether a person who makes a contract is bound to perform it, or whether he simply assumes the risk of having to pay damages, is an important question which will be discussed hereafter in connection with the subject of remedies for breach of contract.”<sup>22</sup>

For Holmes, this “important question” had an answer. As he had observed before, “it is obvious that the main consequence attached by the law to a contract is a greater or lesser possibility of having to pay money.”<sup>23</sup> He urged Harriman to adopt this view in his chapter on remedies:

The liability to pay is the consequence attached by the law to his act—When he commits a tort the liability is absolute—When he commits a contract the liability is defeasible for the happening of an event . . . . [A] contract at common law is nothing but a conditional liability to pay damages, defeasible by performance.<sup>24</sup>

In Harriman, Holmes believed he found a kindred spirit. He too wanted to provide an objective account of contract law. Notions that a legally enforceable promise turned on whether two individuals subjectively intended to agree with each other did not capture what the law did. Like the geologist trying to sort through rocks or the botanist looking for a way to classify flowers, legal scholars needed to discover the principles that accu-

18. Edward Avery Harriman, *The Nature of Contractual Obligation*, 4 Nw. L. Rev. 97 (1896).

19. *Id.* at 99.

20. *Id.*

21. *Id.* at 100.

22. *Id.* at 108.

23. Oliver Wendell Holmes, Jr., *The Common Law* 248 (Mark DeWolfe Howe ed., Belknap 1963).

24. Seipp, *supra* n. 2, at 527 (Ltr. from Oliver Wendell Holmes, Jr. to Edward Avery Harriman (Jan. 7, 1896)).

rately identified what actually happened when courts were called upon to enforce contracts. From Holmes's perspective, common law courts, when called upon to enforce contracts, merely required the payment of money damages. Saying that a contractual obligation was merely an obligation to perform or pay money damages simply and completely described what courts did in contracts cases.

If I perform some negligent act, I become obliged to pay you a compensatory sum. By driving negligently, I "commit" a tort. If I make a legally enforceable promise to you, I commit myself to pay you a compensatory sum, unless some event comes to pass. By promising to mow your lawn, I "commit" a contract. The only difference is that the act that triggers the contractual obligation is subject to defeasance, while the act that triggers the tort obligation is not. This was not, of course, the way that ordinary individuals thought about contracts. Nor did it reflect how most individuals thought about contractual obligations. But this was quite beside the point. It provided an account of how courts act when confronting a legally enforceable promise and explained as much as other accounts. It was to be preferred over these because it was simpler.<sup>25</sup> Injecting notions of morality or other ideas did not work. They had, in the words of pragmatists Charles Sanders Pierce and William James, no "cash value."<sup>26</sup> If they provide no help in describing the pattern of decided cases, they are not useful.

To understand Holmes's "bad man" view of the law and his account of contract as an option to perform, one must first confront what Holmes believed to be the testing hypothetical. Our neighbor plans on having a big party outside on Saturday. I promise to mow his lawn in exchange for \$10. You promise, in exchange for \$10, to cover his losses in the event that it rains on Saturday and the party has to be cancelled. There are two variations on the facts to consider. First, I break my promise to mow the lawn, and our neighbor suffers damages as a result. In the other case, it rains and he is forced to cancel the party. How do we think about these two cases? For purposes of everyday life, of course, the two situations are not at all the same. I broke my promise while you simply provided insurance and the policy has been triggered. But for Holmes there is nothing from the judge's perspective that distinguishes the two cases. In both cases, a person can come to court and force us to pay a compensatory sum. He has to show in both cases that we became obliged to pay if the promised event (mowing of the lawn or good weather) did not come to pass. For the judge, it is a matter of complete indifference why I broke my promise or why the sun did not shine. We both committed ourselves to pay if specified circumstances came to pass. Because they did, our neighbor has the right to go to court and have a judge order us to pay money. The statement that one who makes a promise must pay damages if the promised event comes to pass encompasses both types of liability equally well. As far as what the judge is called upon to do, there is no difference between the two.

Harriman, however, rejected this account.<sup>27</sup> In his view, a legally enforceable promise contained both a primary obligation to keep the promise and a second obliga-

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25. See Thagard, *supra* n. 12, at 87–89.

26. See Marlow Ediger & D. Bhaskara Rao, *Philosophy and Curriculum* 56 (Discovery Publ. 2003).

27. See Edward Avery Harriman, *The Law of Contracts* 322 (2d ed., Little, Brown & Co. 1901).

tion, such as the payment of damages, if one failed to keep the primary obligation. In some cases, the primary and secondary obligations correspond with each other. In the case of the promise to compensate our party-giver if the weather isn't good, "the primary obligation to compensate the other party for the non-occurrence of the promised event is necessarily coincident with the secondary or sanctioning obligation to pay damages for breach of contract."<sup>28</sup> But in other cases, the two do not correspond. When I promise to mow your lawn, there is a primary obligation—my obligation to mow your lawn—and a secondary obligation—to pay you damages if I fail to do so. As Harriman explained, "every breach of contract gives rise to a secondary obligation to pay damages; but in contracts where the thing promised is within the control of the promisor, there is, in addition, a distinct primary obligation to perform the contract . . ."<sup>29</sup>

Holmes developed his "bad man" trope only because his initial effort to persuade Harriman had not worked. He saw himself as the good teacher who tries a different explanation after the first failed. The bad man argument was in service of his effort to show that splitting of promissory obligations into primary and secondary obligations was not the best way for a fellow pragmatist to think about contracts. In Holmes's view, the split introduced complexity without any offsetting contribution. Just as one force explains both electricity and magnetism, one legal principle explains both the case where I promise good weather and the case where I promise to mow your lawn. Moreover, it forges a tight link between tort and contract liability. Positing a moral obligation was tantamount to positing the existence of phlogiston, a substance with negative weight, to explain combustion.<sup>30</sup>

Holmes and Harriman shared an objective view of the law. Both were in search of general principles that would give a theory of contract analogous to the account scientists gave to the world around them. From Holmes's perspective, Harriman's account was flawed because it injected a concept—the distinction between primary and secondary obligations—that did too little work. In trying to account for what courts do, nothing is gained from distinguishing a promise to pay you if the sun doesn't shine from a promise to mow your lawn. I have to pay a compensatory sum in both cases if the promised event comes to pass. Holmes took Harriman to task because his account added complexity without any corresponding benefit.

Harriman claimed that his distinction between primary and secondary obligations did in fact do work.<sup>31</sup> It allowed one to distinguish between those case in which specific performance was available and those in which only damages were available. In both cases, there was a primary obligation to perform, but in one instance that secondary obligation was to comply with an injunction and in the other the secondary obligation was to comply with an order to pay damages. But Holmes responded that there were "relatively few" cases in which equity responded with an injunction and "I hardly think it advisable

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28. *Id.* at 322.

29. *Id.*

30. Phlogiston was the rival theory to Lavoisier's oxygen theory. See Thagard, *supra* n. 12, at 77–78.

31. To put the point formally, even if his theory were somewhat more complex, it possessed greater "conscience" than Holmes's. *Cf. id.* at 79–85.

to shape general theory from the exception . . . .”<sup>32</sup> Therefore, he observed, “it would be better to cease troubling ourselves about primary rights and sanctions altogether than to describe our prophecies concerning the liabilities commonly imposed by the law in those inappropriate terms.”<sup>33</sup>

For these reasons, Holmes believed his own account of contract damages was to be preferred over Harriman’s. One should favor simple accounts over more complicated ones. Holmes puts it bluntly: “Mr. Harriman[ ] in his very able little book upon Contracts has been misled.”<sup>34</sup> That Holmes’s discussion of contracts is in fact part of an ongoing dialogue with another scholar has been neglected.<sup>35</sup> To engage Holmes on his own terms, one should ask whether alternative accounts of contract law possessed sufficient additional explanatory power to offset the additional complexity. Or, to put the same question differently, one should ask whether there are important ways in which his theory of contract damages fails to capture important features of the law.

## II.

It is hard to predict Holmes’s reaction to the warm embrace his account of contract remedies enjoyed with the law-and-economics scholars of the late twentieth century. Posner suggested that it made sense to calibrate contract damages in such a way that a promisor was liable to pay only a “compensatory” sum.<sup>36</sup> If the promisee was fully compensated for any harm she suffered in the wake of the breach, the promisor would internalize the costs that her conduct imposed on others. If she still broke her promise, it would necessarily be because the social benefits of breach exceeded the social costs. If I have promised to mow your lawn on Saturday, but my talents are better put to use doing brain surgery, the world is better off if I breach. You can find someone else to mow your lawn, I can make you whole for any additional costs, and some third party’s life will be saved. The rule, in addition to being simple, makes sense. It promotes “efficient breach.”<sup>37</sup>

This idea of efficient breach would be quite foreign to Holmes’s way of thinking at the time he wrote *The Common Law*. Holmes did not think of the law as gears in a well-oiled mechanical system. Holmes did not think that the common law possessed an inherent logic:

[W]hile, on the one hand, there are a great many rules which are quite sufficiently accounted for by their manifest good sense, on the other, there are some which can only be understood by reference to the infancy of procedure among the German tribes, or to the social condition of Rome under the Decemvirs.<sup>38</sup>

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32. Holmes, *supra* n. 3, at 462–63.

33. *Id.*

34. *Id.* at 462.

35. Seipp’s article is, of course, a conspicuous exception. See Seipp, *supra* n. 2. A search of Westlaw reveals no one else who talked about Holmes, Harriman, and the “bad man”—apart, of course, from Holmes himself.

36. See Posner, *supra* n. 14, at § 4.8.

37. See *id.*

38. Holmes, *supra* n. 23, at 245.

But at the time of the *Path of the Law*, Holmes was ready to look to the social sciences for help in deciding cases sensibly. Moreover, Holmes would surely have been sympathetic with Richard Posner's ambitious agenda in *Economic Analysis of Law*. It was the same agenda he had had in *The Common Law*: To lay out the basic principles of the common law in a single volume.

For purposes of this essay, I wish to focus on a neglected parallel between Holmes and Posner. Just as Holmes's view of the law took shape out of an ongoing dialogue with a young professor on the rise, so too did Posner's. In a series of pathbreaking articles, the young Richard Epstein challenged Posner on the ground that they failed to provide as illuminating account of the common law as one that gave free reign to individual action except when it involved force or fraud upon another. Just as the idea of primary obligations gave a deeper understanding of contract, Epstein's identification of the prohibitions against the use of force or fraud provided a better account of tort.

As fierce as the great debates were between Epstein and Posner during the 1970s, they shared the same essential feature as the much quieter and less public debate between Holmes and Harriman during the 1890s. The question was who was providing the best theory, the theory that gave the better account of the law—the most straightforward one based on simple stated principles or the more nuanced one that looked behind simply stated legal rules and set out larger scale principles (the centrality of the principles of force and fraud, on the one hand, and the idea of primary and secondary obligation on the other).

In the next part of this Essay, I suggest how Harriman's vision of contract law might be brought back. More particularly, it is an effort to view Harriman (and Holmes, as well) through the kind of lens that Richard Epstein brought to the torts jurisprudence of Richard Posner. Indeed, one of Epstein's notable insights in torts, specifically on tortious interference with contract, connects with Harriman's own critique of Holmes.

### III.

Harriman tried to respond to Holmes's criticism of his work in the second edition of his book on contracts. Holmes's account of contract remedies can be squared with legal doctrine only when one limits it to common law causes of action. For Harriman this was contrary to the spirit of the pragmatist enterprise. An account of contractual obligation that ignored what happened before the Chancellor was artificially truncated. No botanist would claim to have a theory if the theory were limited, by its terms, to yellow flowers. To give a scientific account of the law, one needed to provide a parsimonious explanation of the outcome of all cases. Clients care about their obligations independent of which court happens to enforce them. Moreover, even with respect to common law courts, specific enforcement had a long history. Holmes's account neglected centuries of history. As Pollack and Maitland had pointed out, "[t]he oldest actions of the common law aim for the most part not at 'damages,' but at what we call 'specific relief' . . ."<sup>39</sup> In this respect, Harriman anticipates Epstein's initial critique of Posner. Harriman finds Holmes's account of contract ahistorical, just as Epstein argued that Posner's account of

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39. Harriman, *supra* n. 27, at 322 (quoting Pollock & Maitland, *History of English Law*, vol. II, 593).

tort law failed to see that, at its roots, was the principle of strict liability and that negligence was something of a late arrival.<sup>40</sup>

Harriman's second critique of Holmes went to the heart of the matter. Positing both primary and secondary obligations explained cases that Holmes's theory could not. While not as simple, it did more work. Harriman uses *Lingenfelder v. Wainwright Brewing Co.* to illustrate.<sup>41</sup> An architect refused to turn over his plans or perform under his contract unless the brewery agreed to buy refrigerating equipment from the company of which he was the president. The brewery needed the plant to be built immediately and did not want to wait to sue the architect for damages. So the brewery agreed to increase his fee to induce him to perform. When the architect tried to collect the higher fee, the brewery refused. The court held that the promise to pay the additional fee was unenforceable because it was not supported by consideration.<sup>42</sup>

Holmes's account of contractual liability, one in which the promisor had a choice between performing or paying damages, could not explain such cases. If the architect had the choice to perform or subject himself to money damages, then his refusal to perform was something he was entirely justified in doing. Hence, the new deal, one in which the architect gave up his option to breach and performed instead, was supported by consideration. But the law is otherwise. It is standard blackletter law that a promise to pay more for a performance already promised is not supported by consideration.

Harriman's account could make sense of such cases. In his view, the architect's obligation to pay damages when he broke his promise was merely a secondary consequence of the primary obligation to keep the promise. It was the way in which the law happened to enforce the obligation, but it was distinguishable from the underlying obligation itself. Because the underlying obligation existed independent of the remedy, the promisor did not have an option not to perform. Hence, he gave no new consideration when he reiterated his promise to perform. He possesses no "option" that gives him a choice. This example shows how positing an underlying primary obligation does work independent of the sanction associated with the violation of the right. This decision and others like it could readily be explained by positing the existence of a primary obligation. Quarks cannot be seen, but there are some phenomena that can be explained only if they do. Harriman's primary obligation is a legal analogue.

Though not noted by Harriman, conceiving the law of contracts as embodying a principle of primary obligation makes it possible to explain another important feature of contract law. The victim of a breach of promise possesses both a shield and a sword. In the face of a breach of promise, she can both sue for money damages and suspend her own performance. Imagine that I promise to mow your lawn on Saturday morning and in return you promise to wash my car Saturday afternoon. As it happens, it is extremely easy for you to find someone else to mow your lawn, but extremely hard for me to find someone else to wash my car. Saturday morning comes and I discover a much better use of my time (brain surgery again, let us say) and I breach. At this point, you can refuse to

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40. See Epstein, *supra* n. 15.

41. 15 S.W. 844 (Mo. 1891).

42. *Id.* at 848.

wash my car. You are not liable for any damages, no matter how costly it is for me to find someone else.<sup>43</sup>

An account of contractual liability that gives the promisor the choice between performing and paying a compensatory sum does not explain this case. If there were no such thing as the existence of an underlying primary obligation and I possessed an option to perform or not as I pleased, then it would seem that my breach would not affect your own option to perform or pay money damages. Of course, it is possible to restate Holmes's principle: The promisor has the right to perform or, in the alternative, pay money damages and lose the benefit of performance by the other party. But this reformulation is beginning to take us away from where Holmes started. Indeed, it shows how Holmes's understanding of the relationship between paying damages and performance is inverted. He claims that a contractual commitment is an obligation to pay damages subject to defeasance by the happening of a particular event (performance). But it is properly the other way around. Performance is the primary component of contractual obligation, not simply something that calls off the obligation to pay money. Quite apart from any obligation to pay damages, you must perform in order to obtain performance in return.

More to the point, Holmes, like Harriman, is in search of the best and simplest principles of law. The more epicycles one introduces into the mechanism, the worse it fares relative to rival accounts. Qualifications such as these, at least in any number, are exactly what Holmes cannot accept, given his own ambition to offer a parsimonious account of the law of contract. And this is not the end of the problems with Holmes. As Richard Epstein points out, if the law understood that a contractual obligation was merely an option to perform or pay damages, then a trustee under a duty to maximize the trust res should be obliged to exercise that option when it benefited the trust to do so, just as she must exercise any other option that belongs to the estate.<sup>44</sup> But this is not the law.

One should be cautious before going too far in Harriman's defense. Relative to the other protagonists on the stage (Holmes, Posner, and Epstein), Harriman was the intellectual midjet. His analysis is thin and his third and final rejoinder to Holmes (that "the doctrine involves an unreasonable departure by the law from fundamental ethical principles") is hardly illuminating.<sup>45</sup> Indeed, it is completely contrary to what Holmes expected to find in someone who seemed so in tune with his own agenda for making sense of the law.

But perhaps we can improve on Harriman. Let me suggest another place where Harriman's theory of primary and secondary obligations does work. It is at the intersection of tort and contract. It may not loom large in terms of decided cases, but it may be, like the retrograde motion of Mars, the key to seeing the principles at work in the law of contract.

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43. Lord Mansfield sets out this idea of the presumptive interdependence of promises in *Kingston v. Preston*, 2 Doug. 689 (K.B. 1773).

44. This comment was made orally in response to my paper at the Legal Scholarship Symposium on Thursday, March 6, 2009 at the University of Tulsa. See generally Richard A. Epstein, *The Reflections and Responses of a Legal Contrarian*, 44 Tulsa L. Rev 647 (2009).

45. Harriman, *supra* n. 27, at 323.

The case is the first that Harriman cites in his chapter on remedies, though he makes little use of it.<sup>46</sup> You hire me to sing at your opera house. Another impresario, knowing of the contract between us, persuades me to breach my contract with you and sing for him instead. He has a larger opera house and is able to put my talents to better use. To put it in Posnerian terms, he induces an efficient breach. In Posner's world, this impresario should be entitled to a parade down Main Street. In Holmes's world, there might be no particular enthusiasm for the impresario's actions, but the rival has done nothing to which a judge need pay attention. He has merely persuaded me not to defeat my commitment to pay damages by choosing to perform.<sup>47</sup>

But in our world, we have quite a different result. You have an action against the impresario in addition to an action against me.<sup>48</sup> In Harriman's scheme, the existence of the action is completely consistent. The action against the third party exists because you enjoyed not simply a right to expectation damages, but a right to performance. The law protects this right to performance through a damage remedy, but also through a right to bring an action against the person who induced the breach (and was on notice of it).

This suggests a radical, Epsteinian inspired reformulation of the law of contract.<sup>49</sup> To understand what a judge does in contract cases, we posit first that every legally enforceable promise comes with a primary obligation to keep the promise. Associated with this primary obligation is the remedy that the law attaches to the failure to do it. And the remedy in the first instance is a right to specific performance. The damages remedy, far from being an option available to the promisor, is the exception to the general rule. Again, this is the better view as a matter of history. To quote Pollack and Maitland again, "[t]he oldest actions of the common law aim for the most part . . . at specific relief."<sup>50</sup>

In terms of litigated cases, we may see damages actions more often, but this does not mean that they are more fundamental. Return to Benjamin Lumley, the impresario who sued both the singer and the competitor who lured her away. The tort of tortious interference with contract can be justified precisely because the underlying primary obligation is enforced through equitable relief. Gye committed a tort by inducing Wagner to breach because Wagner's obligation to sing was protected by a property rule. Wagner did not have an "option" to sing or pay damages. Hence, Gye had no right, assuming he was on notice of the contract, to induce her to breach. His actions violated a property right that Lumley had.

Holmes's account of contract and specifically his assertion that damages are the primary remedy cannot explain tortious interference. The tort exists even when there might be a defense (such as one based on the Statute of Frauds) to the underlying cause of action.<sup>51</sup> Moreover, it exists even when the remedy on the underlying contract is li-

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46. *Lumley v. Gye*, 118 Eng. Rep. 749 (1853).

47. Of course, others have noticed that Holmes's account of contract law does not mesh well with tortious interference. My principal point here is that Harriman's does.

48. See *Lumley*, 118 Eng. Rep. 749.

49. See Epstein, *supra* n. 17.

50. Harriman, *supra* n. 27, at 322 (quoting Pollock & Maitland, *History of English Law vol. II*, 593).

51. See *Harris v. Perl*, 197 A.2d 359, 363 (N.J. 1963) (quoting Prosser, *Torts* § 106, 726 (2d ed., West

mitted to expectation damages. The contractual obligation to perform is at its heart a property rule. While the property-like nature of the rule is typically beneath the surface, it exists nevertheless. One can enjoin a third party from interfering with a contract, even if the promisee is entitled only to money damages.<sup>52</sup> Damages are available to capture the gains that the tortious interferer enjoys, even if they are greater than the expectation damages to which the promisee would be entitled.<sup>53</sup> Holmes's account of contract cannot explain what is going on, but a property-focused theory of primary and secondary obligations can.

The question—and the one I leave with you—is how much do we make of tortious interference with contract. Defenders of Holmes might well point out that the tort is a late arrival and lives at the periphery of contract law. That Holmes's basic principle does not capture it is of little moment. In law, as in life, ninety-five percent is perfection.<sup>54</sup> But there is a different view. It is exactly at the periphery that we can see the difference between crude categories and fundamental principles. For the Young Astronomer, such things as the retrograde motion of Mars should not be glossed over. It is this need to understand fundamental principles that characterizes Richard Epstein's work and what makes it so formidable. Again, it is the difference between physics and stamp-collecting.

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1955).

52. See Fred S. McChesney, *Tortious Interference with Contract Versus "Efficient" Breach: Theory and Empirical Evidence*, 28 J. Leg. Stud. 131, 169–70 (1999).

53. *Id.* at 168–69.

54. This was an axiom of our late colleague Walter Blum.